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In the Supreme Court of the United States

October Term, 1984

CITY OF CLEVELAND,
Petitioner,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Can a trial court refuse to give collateral estoppel effect, in a suit between private litigants, to final factual determinations made by an administrative agency acting in a judicial capacity in a proceeding in which the same private litigants participated and had a full and fair opportunity to litigate?

2. Did the trial court commit legal error and abuse its discretion by requiring, before admitting evidence to prove the "purpose and character" of other acts pursuant to the *Pennington* evidentiary exception, a showing that the evidence does not have *any* "chilling effect" on First Amendment rights and a showing that its probative value outweighs the danger of unfair prejudice, rather than the reverse?

3. Does this Court's decision in *Otter Tail* render irrelevant to an antitrust case a state taxpayer's suit previously brought to block an FPC-ordered interconnection?

4. Can a single lawsuit be a sham proceeding under this Court's decision in *California Motor*?

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit in a civil case involving the parties named in the caption.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") A at A1) is reported unofficially at 1984-1 Trade Cas. (CCH) ¶ 66.016. Relevant orders of the District Court were reported at 538 F. Supp. 1227 (App. C at A35) and 538 F. Supp. 1274 (App. I at A109) and 538 F. Supp. 1328 (App. F at A88). Other relevant orders of the District Court appear in the Appendix (App. E at A72; App. G at A103; App. H at A105).

JURISDICTION

The judgment of the Court of Appeals (App. J at A121) was entered on May 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

The issues presented by this Petition for a Writ of Certiorari concern the collateral estoppel effect of an antitrust review performed by the Nuclear Regulatory Commission pursuant to Section 105A of the Atomic Energy Act, 42 U.S.C. § 2135(c) (1976) (App. K at A122) and the proper application of Rules 403 (App. L at A125) and 404(b) (App. M at A126) of the Federal Rules of Evidence and decisions of this Court.

STATEMENT OF THE CASE

The City of Cleveland ("City"), petitioner, operates a municipal electric system in competition with respondent, The Cleveland Electric Illuminating Company ("CEI"). In this treble damage action, the City charged that CEI had monopolized and attempted to monopolize relevant markets in violation of the Sherman Antitrust Act by refusing to interconnect with the City's electric system, by refusing to wheel (transmit) over CEI's transmission lines power which the City had obtained from the Power Authority of the State of New York, and by engaging in other unfair trade practices. The City seeks review of a judgment of the Court of Appeals for the Sixth Circuit by which a divided panel affirmed the judgment entered by the district court upon a verdict for CEI. The Court of Appeals approved, *inter alia*, the orders of the district court which (1) denied collateral estoppel effect to final adjudications of fact by the Nuclear Regulatory Commission in an antitrust review which involved the City and CEI, and (2) barred the use of Joint Stipulations of Fact which disclosed CEI's secret solicitation and funding of a taxpayer's suit (not brought in CEI's name) to block an interconnection between the two electric systems previously ordered by the Federal Power Commission, which stipulations were proffered to show the purpose and character of CEI's acts.

A. Proceedings in the Nuclear Regulatory Commission

After this case was filed on July 1, 1975, but before this case was tried in the district court, CEI's conduct was the subject of a thorough antitrust review by the Nuclear Regulatory Commission ("NRC"), formerly the Atomic Energy Commission, in which the City and CEI both participated. The NRC antitrust review was triggered by the

applications of CEI and four other private electric utility companies in Ohio and Pennsylvania, comprising the Central Area Power Coordination Group ("CAPCO"), for licenses to construct and operate five nuclear generation facilities in northern Ohio.

On December 17, 1973 and February 14, 1975, the Attorney General of the United States, acting pursuant to 42 U.S.C. § 2135 (1976), advised the NRC that hearings should be held to determine whether activities under the licenses would create or maintain a situation inconsistent with the antitrust laws. By order of the NRC, the City and the United States Department of Justice were permitted to intervene in the NRC proceedings. *In re Toledo Edison Co. and Cleveland Electric Illuminating Co.*, 5 NRC 133, 138-39 (1977), *aff'd* 10 NRC 265, 277 (1979).

Following extensive discovery in which all parties participated, and a hearing lasting seven months, the NRC Atomic Safety and Licensing Board ("Licensing Board") issued its Initial Decision (Antitrust) on January 6, 1977, finding that unconditioned licensing of the nuclear units in question would create or maintain a situation inconsistent with the antitrust laws. The Licensing Board ordered that ten specific conditions be attached to the licenses. 5 NRC at 256-59. In order to reach these conclusions, the Licensing Board, acting in a judicial capacity, made 222 findings of fact, including findings concerning anticompetitive conduct by CEI, and reached conclusions of law.

On September 6, 1979, the NRC Atomic Safety & Licensing Appeal Board ("Appeal Board") affirmed, with modifications, the Licensing Board's Initial Decision (Antitrust), and in so doing, resolved the overwhelming majority of the factual issues in the identical way the Licensing Board had. The full Commission declined to review the Appeal Board's decision. Therefore, under the Rules of Practice of the NRC, on October 10, 1979 the factual findings which had been made in the identical way by both the

Appeal Board and the Licensing Board became final factual adjudications by the NRC. *See infra* at pp. 14-15. The CAPCO companies, including CEI, appealed the NRC's decision to the Third Circuit Court of Appeals; on October 8, 1980, these appeals were dismissed pursuant to a stipulation signed by all of the parties.[1]

B. Proceedings Below in the District Court and in the Sixth Circuit Court of Appeals

1. Motion for collateral estoppel

When the NRC's findings of fact had become final and binding on both the City and CEI, the City lodged with the district court the opinions of the NRC Licensing Board and the NRC Appeal Board.[2] On October 26, 1979, the City moved the trial court to enter an order *in limine* holding the facts finally adjudicated by the NRC concluded for the purposes of the district court action. App. B at A33.[3] The trial court denied this motion on January 15, 1980; 538 F. Supp. 1227, App. C at A35. The City was compelled to

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1. Copies of dockets of the Third Circuit Court of Appeals have been lodged with the Clerk of this Court.

2. Petitioner has lodged with the Clerk of this Court (1) the Licensing Board's published opinion (*In re Toledo Edison Co. and Cleveland Electric Illuminating Co.*, 5 NRC 133 (1977)) and (2) the slip opinion of the Appeal Board's affirmance which was published at 10 NRC 265 (September 6, 1979). Because all the citations to the Appeal Board opinion in the briefs and appendices below were to the slip opinion of the Appeal Board (ALAB-560) petitioner has lodged with the Clerk of this Court the slip opinion rather than the published opinion. However, where citations are made to the slip opinion hereafter, parallel citations are provided to the Appeal Board's published opinion.

3. The City's motion included an appendix containing a copy of the Licensing Board's Findings of Fact Nos. 1 through 222 which showed deletions of the following material for which the City was not seeking collateral estoppel effect: (a) the NRC's conclusions of law; (b) observations made by the NRC which were not findings of fact; and (c) facts which were not found in the identical way by both the Licensing Board and the Appeal Board. This appendix also cross-referenced paragraphs of the district court complaint which contained allegations to which the factual findings of the NRC were relevant. A copy of this appendix has been lodged separately with the Clerk of this Court.

relitigate identical factual issues in the district court which had been finally resolved previously by the NRC. This relitigation occurred twice, since the first trial of this antitrust case resulted in a hung jury. *See infra* at p. 6.

2. Proffer of the Miller Stipulations

A proceeding before the Federal Power Commission ("FPC") had also preceded the trial of this case. In May 1971, the City had applied to the FPC for an order requiring CEI to provide a permanent interconnection between the electric systems of the City and CEI. On March 8, 1972, the FPC ordered a temporary emergency interconnection between the two systems and CEI agreed to the interconnection at the FPC hearing. Joint Stipulation No. 230; App. D at A69. Following the FPC order, CEI wrote to the City reiterating that it agreed there should be an interconnection and assuring the City that CEI "would be happy to work with [the City] on all of these matters."[4] On July 12, 1972, the FPC ordered that a permanent 138 kV synchronous interconnection be established between the two electric systems.[5]

In 1980, just before the first trial began in the district court below, the City learned that in 1972, after the FPC had ordered the temporary emergency interconnection, CEI had secretly sponsored and financed the filing and maintenance of a taxpayer's suit to block construction of the interconnection. Following this revelation, the City and CEI entered into Joint Stipulation Nos. 227 through 241, App. D at A68, which described CEI's 1972 role in work-

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4. *Id.* and Plaintiff's Exhibit PTX-2694, a letter from CEI to the City, April 11, 1972, lodged with the Clerk of this Court.

5. CEI did not take exception to this order, except that it asked that the permanent interconnection agreements run for an initial period of five years from the time the interconnection was first placed into service, cancellable thereafter on one year's notice by either party. *See* FPC Order No. 644, January 11, 1973 at 7, lodged with the Clerk of this Court.

ing through an outside law firm to hire another attorney to bring the taxpayer's suit in his name, and in secretly providing funds and technical assistance in connection with that suit. The attorney to whom CEI's outside law firm transmitted funds to prosecute the taxpayer's suit was Charles Miller, Esquire and Joint Stipulation Nos. 227 through 241 came to be known as the "Miller Stipulations."

At the first trial, the court initially excluded the Miller Stipulations from evidence (Oral Order, September 19, 1980, App. E at A72), but later admitted them to rebut statements by CEI's witnesses that CEI had done nothing to interfere with the construction of the interconnection. Before the second trial began, the court reaffirmed its September 19, 1980 Oral Order, ruling that the Miller lawsuit was not a "sham" proceeding and holding that before the Miller Stipulations could be introduced in the second trial as "purpose and character" evidence, the City would have to show that "their probative value outweighs the likely prejudicial effect." Order, May 18, 1981, 538 F. Supp. 1328, 1334, App. F at A88, A101.

During the second trial, the City three times sought unsuccessfully to introduce the Miller Stipulations. Order, July 30, 1981, App. G at A103; Oral Order, August 3, 1981, App. H at A105; Order, August 17, 1981, 538 F. Supp. 1274, App. I at A109. Thus, the second jury never learned of CEI's 1972 role in the Miller lawsuit to block the interconnection.

3. Judgments below

The case was first tried between September 2 and November 4, 1980. After 13 days of deliberation, the jury was divided five to one in favor of the City,[6] but it informed the court that it was unable to agree on a verdict. The first jury was dismissed on November 19, 1980. The

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6. *See* Tr. 10,103, lodged with the Clerk of this Court.

case was tried to a second jury from July 13 to October 7, 1981. The next day, October 8, 1981, the jury returned a verdict for CEI. On November 6, 1981, the trial court denied the City's motion for judgment n.o.v., or in the alternative, for a new trial.

The City filed an appeal in the Sixth Circuit Court of Appeals and oral argument was held on February 15, 1983. On May 24, 1984, a divided panel of Circuit Judges Wellford, Merritt and Martin affirmed the judgment below. App. A at A1. Circuit Judge Wellford wrote the opinion for the panel majority and Circuit Judge Merritt filed a concurring opinion concerning the Miller Stipulations. Circuit Judge Martin dissented, stating that the trial court's refusal to give collateral estoppel effect to the findings of fact made in the NRC proceedings, and the trial court's exclusion of the Miller Stipulations, were prejudicial errors which required vacation of the judgment and remand for a new trial.

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS' DECISION BELOW CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT WHICH APPLY COLLATERAL ESTOPPEL WHERE THERE IS MUTUALITY OF PARTIES

The Court of Appeals' decision below vests trial courts with discretion to refuse to apply collateral estoppel to preclude the relitigation of factual issues concluded in prior litigation between the same private litigants. This ruling is repugnant to controlling decisions of this Court.

The panel majority misread or misapplied this Court's decisions in *Montana v. United States*, 440 U.S. 147 (1979) (*"Montana"*), *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (*"Parklane"*), *United States v. Utah Construction*

Co., 384 U.S. 394 (1966) ("*Utah*"), and *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1982) ("*Kremer*"), as the dissent below makes clear. In addition, the panel majority, seemingly through error or oversight, failed to refer to and failed to apply the clarifications of the collateral estoppel doctrine which this Court announced four months earlier (January 10, 1984) in *United States v. Stauffer Chemical Co.*, ... U.S. ....., 104 S. Ct. 575 (1984) ("*Stauffer*")[7] and *Mendoza v. United States*, ... U.S. ....., 104 S. Ct. 568 (1984) ("*Mendoza*").

In *Mendoza*, this court held that collateral estoppel does not apply against the government in nonmutual situations. In *Stauffer*, this Court held that where there is mutuality between the parties, collateral estoppel applies against the government and private litigants alike. In both *Mendoza* and *Stauffer*, this Court reaffirmed its holding in *Montana* that

> [u]nder the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, *that decision is conclusive* in a subsequent suit based on a different cause of action involving a party to the prior litigation.

Montana, 440 U.S. at 153 (emphasis added).

In the decision below, the Court of Appeals confused the collateral estoppel rules laid down by the decisions of this Court. The Court of Appeals treated this case, where the parties to the antitrust action in the district court had also faced each other in the NRC proceedings, as if it were a case of *nonmutual* estoppel where one of the parties in the second litigation was a stranger to the earlier pro-

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7. Neither did the panel majority attempt to reconcile the conflict between its decision and the opinions of Circuit Judges Weick and Jones and District Judge Siler, who constituted the Sixth Circuit panel which applied collateral estoppel in *Stauffer* before the case was affirmed by this Court. *United States v. Stauffer Chemical Co.*, 684 F.2d 1174 (6th Cir. 1982).

ceeding. Such treatment was in conflict with *Stauffer*, *Mendoza*, and *Montana*.[8]

Circuit Judge Martin, in dissenting from the decision of the panel majority below, stated:

> I note that the district judge believed that he was entitled to exercise "broad discretion" in deciding whether to employ collateral estoppel. *See City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1227, 1232 (N.D. Ohio 1981). The majority seems to agree. However, in the case which is cited for this proposition, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), the Supreme Court was referring only to decisions concerning the use of so-called "offensive" collateral estoppel. In such cases, where there is no mutuality between the parties, the Court recognized that there could exist many complicating circumstances that would make the imposition of collateral estoppel unfair in particular cases. The Court's solution to this problem was to give the trial judge broad latitude in considering whether to apply the doctrine in a given case. When, as here, there is mutuality between the parties, these considerations do not apply. The decision to invoke or not to invoke collateral estoppel becomes a question of law, and like all such questions, is freely reviewable by this Court.

City of Cleveland v. Cleveland Electric Illuminating Co., No. 82-3053, Slip Opinion at 24 n.1 (6th Cir. May 24, 1984), ("Slip Opinion"), App. A at A26 n.1.

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8. The basic distinction drawn by this Court in *Stauffer* and *Mendoza* between *mutual* and *nonmutual* cases is a more significant distinction than the difference between so-called "offensive" and "defensive" uses of collateral estoppel. "[T]he distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between 'offensive' and 'defensive' issue preclusion . . ." *Davidson v. Lonoke Production Credit Ass'n*, 695 F.2d 1115, 1121 (8th Cir. 1982) *quoting with approval* RESTATEMENT (SECOND) OF JUDGMENTS, § 29, Reporter's Note (1982) at 299-300.

Circuit Judge Martin's dissenting opinion below is in accord with the decisions of this Court which distinguish between cases where there is no mutuality and cases where mutuality exists between the parties. Where there is no mutuality, collateral estoppel will not be applied against the government, *Mendoza*, but can be applied against a private litigant, *Parklane*. In estoppel situations where mutuality exists between the parties, collateral estoppel will be applied against both the government and private litigants, *Montana* and *Stauffer*, even where the prior proceeding was held in an administrative agency, *Utah* and *Kremer*.[9]

The public policy considerations which apply to the government in the area of issue preclusion (*See Mendoza*, 104 S. Ct. 572-74), do not affect private litigants. If the government is estopped from relitigating previously resolved factual issues where there is mutuality of parties, *a fortiori*, private litigants are similarly estopped.

1. The Collateral Estoppel Issues Presented by This Case Have Broad Implications for the Administration of Justice

In *Allen v. McCurry*, 449 U.S. 90, 94 (1980), this Court "reaffirmed the benefits of collateral estoppel in particular, finding the policies underlying it to apply in contexts not formerly recognized at common law." This Court also declared that the doctrine of collateral estoppel, like the related doctrine of res judicata, serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Id.* at 94.

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9. It should be noted that the instant case does not fit any of the exceptions recognized in *Montana* (*See* 440 U.S. at 155-63) and *Stauffer* (*See* 104 S. Ct. 578-80) where it might be inappropriate for collateral estoppel to be applied.

If left standing, the decision below will represent an erosion of this Court's clearly stated policy of having trial courts invoke collateral estoppel to protect litigants from burdensome relitigation and to promote judicial economy. The disallowance of collateral estoppel in the instant case violated basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. This Court should grant the petition for certiorari and overturn the Court of Appeals' decision which invites district courts to ignore the requirements of the collateral estoppel doctrine on an ad hoc basis. If the petition is not granted so that the error of the Court of Appeals can be corrected, other cases of this kind will certainly find their way to this Court unnecessarily.

2. Collateral Estoppel Applies to Final Factual Determinations Made by the NRC, an Administrative Agency Acting in a Judicial Capacity

In *Utah*, this Court unanimously stated the conditions under which collateral estoppel attaches to an administrative agency's resolution of disputed factual issues:

> Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Utah, 384 U.S. at 422. This Court defined the "adequate opportunity to litigate" requirement as "a fair opportunity procedurally, substantively and evidentially to pursue [the] claim the first time." *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 333 (1971).

The *Utah* principle was applied in *Kremer*, where this Court examined in detail the procedures available to a claimant in a state administrative agency proceeding. This Court concluded that the agency had been acting in a judicial capacity and that the proceeding had offered the claimant a full and fair opportunity to litigate the merits of his claim. Mr. Justice White, speaking for the majority of this Court, stated: "We have no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause." *Kremer*, 456 U.S. at 484.

Collateral estoppel should have been given to the NRC's final factual adjudications in this case because all of the collateral estoppel elements identified by this Court in *Utah*, and all of the traditional elements of collateral estoppel, were satisfied.[10] CEI should not have been permitted to relitigate in the district court the identical factual issues which CEI had litigated, and lost, before the NRC.[11] In the words of Professor Moore, CEI should not have been permitted "an encore."[12]

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10. Note, *The Collateral Estoppel Effect of Admin. Agency Actions in Fed. Civil Litig.*, 46 GEO. WASH. L. REV. 65, at 91 (1977). The traditional elements of collateral estoppel deal with: (1) Jurisdiction; (2) Finality; (3) Relationship of Parties; (4) Identity of Issues; and (5) Foreseeability. *Id.* at 66-87.

11. The characterization by the panel majority below that the NRC granted CEI "a favorable decision, although conditional", Slip Opinion at 12, App. A at A13, is not dispositive. Although the NRC did not refuse to issue a license for the nuclear units, it answered the question whether they should be licensed unconditionally in the negative because of its findings against CEI on factual issues actually litigated by the parties.

12. Professor Moore states that the doctrine of res judicata is a "rule of fundamental repose for both society and litigants. . . . The doctrine prevents an encore and 'reflects the refusal of law to tolerate needless litigation.'" 1B J. MOORE, MOORE'S FED. PRACTICE, ¶ 0.405[1] at 186 (2d Ed. 1983). This paragraph (¶ 0.405[1]) was cited with approval by this Court in *Montana*, *supra*, at 153.

(a) The NRC Licensing Board was acting in a judicial capacity and the parties had an adequate opportunity to litigate

Congress requires the NRC to act in a judicial capacity in antitrust reviews, directing it to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws . . ." 42 U.S.C. § 2135(c)(5) (1976), App. K at A123. To carry out this mandate, the NRC adopted procedures that require the Licensing Board to "make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding . . . ." (10 C.F.R. § 2.760a (1984)) and to render its decision in writing and "based on the whole record and supported by reliable, probative and substantial evidence" (10 C.F.R. § 2.760(c) (1984)).

The parties to the NRC proceeding had an adequate opportunity to litigate the disputed issues of fact which were finally resolved by the NRC. The parties fully used the procedures which the NRC Rules of Practice provide for discovery and the presentation of evidence and argument.[13] The Licensing Board hearings commenced on December 8, 1975 and lasted for seven months, compiling a record of nearly 13,000 transcript pages with over 1,300 exhibits.[14] Donald I. Baker, Assistant Attorney General in charge of the Antitrust Division, stated that this Licensing Board proceeding was "the full equivalent" of a Section 2 monopolization case.[15]

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13. Subpart G of the NRC Rules of Practice provides for *inter alia*, depositions, written interrogatories, production of documents, admissions, prehearing conferences, record and transcript of proceedings, stipulations, proposed findings and conclusions, oral argument, initial decision, petition for reconsideration, and review of initial decisions by the Appeal Board. 10 C.F.R. §§ 2.700-2.790 (1984).

14. *In re Toledo Edison Co. and Cleveland Electric Illuminating Co.*, 10 NRC 265, 277, ALAB-560 at 19 (1979).

15. Address by Donald I. Baker to the Bar Association of the City of New York (January 18, 1977) at 8, lodged with the Clerk of this Court.

The factual issues finally adjudicated by the Licensing Board were necessary to the relief granted. The Licensing Board imposed ten license conditions because of its conclusion that unconditioned licensing of the nuclear units would create or maintain a situation inconsistent with the antitrust laws. For example, having found as a fact that it would be impractical for Cleveland to construct transmission lines across CEI's territory, the Licensing Board required the CAPCO Companies, including CEI, to wheel (transmit) power to and for entities such as the City. 5 NRC at 175, 257, *aff'd*, 10 NRC at 328, 390-92, ALAB-560 at 126, 273-78.

It is clear that the procedures afforded CEI and the other litigants before the Licensing Board were even more complete than were those found by this Court in *Kremer* to satisfy the Due Process Clause for purposes of applying collateral estopppel. The NRC Licensing Board was acting in a judicial capacity and the parties were given a full and fair opportunity to litigate the disputed issues of fact which were properly before the NRC. As the Third Circuit Court of Appeals expressly held, an NRC "licensing proceeding is, then, an adjudication." *Citizens for a Safe Environment v. Atomic Energy Commission*, 489 F.2d 1018, 1021 (3rd Cir. 1974). The "actually litigated" requirement of the collateral estoppel doctrine was satisfied since "the parties to the original action disputed the issue and the trier of fact resolved it." *Continental Can Co. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979).[16]

(b) The decision of the NRC Appeal Board was final

On September 6, 1979, the Appeal Board affirmed, with modifications, the Licensing Board's decision. The

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16. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) and comments b. and c. (1982).

NRC's Rules of Practice provide that the actions of the Appeal Board have "the same force and effect and shall be made, evidenced and enforced in the same manner as actions of the Commission." 10 C.F.R. § 2.785(c) (1984). Further, in the absence of action and review by the full Commission, the Appeal Board exercises the authority and performs the functions which would otherwise have been exercised and performed by the Commission. 10 C.F.R. § 2.786 (1984).[17]

In 1979, the NRC's Rules of Practice provided that the full Commission could review *sua sponte* a decision of the Appeal Board within 30 days from the date of that decision. 10 C.F.R. § 2.736(a) (1977).[18] However, petitions for review of matters of fact will *not* be granted

> [u]nless it appears that the . . . Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner *contrary to the resolution of that same issue by the . . . Licensing Board.*

10 C.F.R. § 2.786(b)(4)(ii) (1984) (emphasis added).

Because the Commission permitted the 30 day period following the date of the Appeal Board's decision (September 6, 1979) to expire without moving to review the Appeal Board's decision, those factual findings made by the Appeal Board which were identical to the factual findings made by the Licensing Board became final factual adjudications by the NRC, binding on all parties. Judicial appeals from the final NRC decision were dis-

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17. This proposition was recognized in *Porter County Chapter of the Izaak Walton League of America, Inc. v. Atomic Energy Comm'n.*, 515 F.2d 513, 516 (7th Cir.), *rev'd and remanded on other grounds per curiam*, 423 U.S. 12 (1975), *on remand*, 533 F.2d 1011 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976).

18. § 2.786(a) was amended in 1980 to make the review period forty (40) days. *See* 10 C.F.R. § 2.786(a) (1984).

missed by the Third Circuit Court of Appeals on October 8, 1980.[19]

(c) Identical issues were litigated in the NRC and in the District Court action below

The comprehensive appendix which was attached to the City's collateral estoppel motion in the district court demonstrates that the factual issues that the City was forced to relitigate in the district court below were identical to the issues for which collateral estoppel effect was sought.[20] CEI could clearly foresee that these issues would arise in the district court action, since the City's complaint in this treble damage action was filed on July 1, 1975, months before the Licensing Board hearings commenced on December 8, 1975.

Petitioner submits that under the authority of this Court's decisions in *Stauffer, Mendoza, Montana, Utah* and *Kremer,* collateral estoppel should have been applied in this case. Petitioner submits that in view of the importance of conserving judicial resources and encouraging reliance on adjudications, this Court should grant certiorari and speak on the issues in this case.

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19. *See supra* at p. 4 n.1. The finality of the NRC's decision was not affected by the parties' rights of judicial appeal since such appeals did not involve *de novo* review. 42 U.S.C. § 2239(b) (1976) and 5 U.S.C. § 706(2)(E) (1976). *See, also,* 1B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 0.416[3] at 521-22 (2d Ed. 1983).

20. *See supra* at p. 4 n.3. The trial court was well aware of the identity of issues as between the NRC proceeding and the district court action. In its order of January 23, 1976, the trial court stated: "It is . . . apparent from the admissions of the parties and the exhibits herein that the City has engaged the defendants in extensive and exhaustive litigation *of what appears to be substantially identical issues* before the Nuclear Regulatory Commission for a period in excess of a year." (Emphasis added.) *See,* Order, January 23, 1976, lodged with the Clerk of this Court.

B. THE COURT OF APPEALS' DECISION AFFIRMING THE EXCLUSION OF THE MILLER STIPULATIONS MISAPPLIED THE "PURPOSE AND CHARACTER" EVIDENTIARY EXCEPTION ENUNCIATED IN PENNINGTON AND IS IN CONFLICT WITH THIS COURT'S DECISIONS IN OTTER TAIL AND CALIFORNIA MOTOR

The panel majority below found that the trial court had neither abused its discretion nor committed legal error in refusing to admit the Miller Stipulations, under a limiting instruction, as evidence of the purpose and character of other acts of CEI. In so finding, the panel majority misapplied Rule 403 of the Federal Rules of Evidence and misread the decisions of this Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) ("*Pennington*"), *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) ("*Otter Tail*") and *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) ("*California Motor*"). This Court should grant this petition to prevent the future use of the erroneous decision below to exclude salient evidence of intent in other cases, and to address the abuse of discretion in this case.

1. The Court of Appeals Misapplied Both the Evidentiary Exception in Pennington and Rule 403 of the Federal Rules of Evidence

The reasoning of the panel majority below disturbs the balance which this Court struck in *Pennington* between the right to petition government and the policy of the law favoring liberal admission of evidence, particularly in antitrust cases. In *Eastern Railroad Presidents' Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1960) ("*Noerr*"), this Court held that genuine efforts to petition the government could not themselves be challenged as violations of the Sherman Act. Shortly thereafter, in *Pennington*, this Court recognized that conduct

which cannot be the basis for a treble damage award under the antitrust laws may still be admissible "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *Pennington* at 670 n.3 (citations omitted).

Note 3 of *Pennington* was a needed clarification of *Noerr* to harmonize it with established law favoring the liberal admission of evidence in antitrust cases,[21] including evidence of conduct which the law prohibited from being the basis of a treble damage award.[22] This established law was the expression, in antitrust cases, of the common law rule of evidence permitting the use of evidence of other acts to prove intent, motive or similar facts, provided that the danger of undue prejudice did not substantially outweigh the probative value of the evidence. SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL (1982) ("Saltzburg & Redden") at 124-26. This law is now embodied in Rules 403 and 404(b) of the Federal Rules of Evidence. App. L at A125; App. M at A126. Moreover, *Pennington* recognized, as the advisory committee note to Rule 403 requires, that in reaching a decision whether to exclude on grounds of unfair prejudice, the court should consider the probable effectiveness or lack of effectiveness of a limiting instruction. *See* Fed. R. Evid. 403, advisory committee note, ¶ 4.

In stark contrast to this careful balancing approach, the decision of the panel majority below (1) rejected balancing in this case so as not to permit *any* "chilling

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21. *Nye & Nissen v. United States*, 168 F.2d 846 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949); *United States v. E.I. Dupont de Nemours & Co.*, 126 F. Supp. 27, 29 (N.D. Ill. 1954).

22. *E.g. Fed. Trade Comm'n. v. Cement Inst.*, 333 U.S. 683, 705 (1948) (Evidence of conduct occurring as much as 27 years before charged conspiracy and actions which were exempt from antitrust laws by statute admissible to show purpose and character of other acts); *Standard Oil Co. v. United States*, 221 U.S. 1, 46-47 (1911) (Acts occurring prior to enactment of Sherman Act admissible to shed light on later acts).

effect" on First Amendment rights, and (2) approved the trial court's inversion of the balancing test enunciated in Rule 403.

In applying *Pennington* to exclude the Miller Stipulations, the courts below gave undue weight to First Amendment concerns without regard to the protection conferred by a limited use instruction. Thus, the trial court held in its order denying the City's first motion for reconsideration during the second trial, that "undue prejudice . . . ensues . . . from the fact that evidence of such protected activity is likely to be considered and utilized by the jury as a legally inappropriate basis for liability . . ." Order, July 30, 1981, App. G at A104. In subsequent orders, the trial court held that, "The purpose of the Noerr-Pennington doctrine is to protect against *any* chilling effect upon the exercise of First Amendment rights" (Oral Order, August 3, 1981 at Tr. 12,626, lines 11-18 (emphasis added), App. H at A105), and that "To adopt the City's position would emasculate and indeed gut the constitutional protection afforded under the *Noerr-Pennington* doctrine and have a 'chilling effect' upon the exercise of First Amendment rights." Order, August 17, 1981, 538 F. Supp. at 1278-79, App. I at A119.[23]

The Court of Appeals followed the trial court's restricted view, holding that admitting the Miller Stipulations even for a limited purpose, presumably under an appropriate instruction, would "expose the jury to the danger of considering that proof for improper purposes." Slip Opinion at 10, App. A at A11.

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23. The trial court's Order of August 17, 1981 overruled the City's third request for reconsideration, in which the City asked the court to admit the Miller Stipulations to rebut the volunteered testimony of CEI's General Attorney, Donald Hauser, that CEI "did not do anything to prevent [the interconnection]." Tr. 14,191 at lines 13-18. If the City's petition for a writ of certiorari is granted, the City intends to present the additional argument, not briefed in this petition, that the Miller Stipulations were admissible to rebut Hauser's testimony.

In his dissenting opinion, Circuit Judge Martin drew attention to the exaggerated deference which the trial court's rulings had given to First Amendment rights:

> Moreover, even if I were to agree with the trial judge's formulation of what constitutes prejudice in this case, the deference which he gives to first amendment rights is much too absolute. If, given the significance of the Miller Stipulations to its case, the City's attempt to take advantage of the evidentiary exception to *Noerr-Pennington* will "gut" the protections afforded by *Noerr-Pennington,* it is difficult to think of any attempt which would not.

Slip Opinion at 23, App. A at A24.

Because First Amendment rights have a preferred position in our judicial system, the City submits that to say that the purpose of the *Noerr-Pennington* doctrine is to protect against "*any* chilling effect" upon First Amendment rights is, effectively, to remove the *Pennington* evidentiary exception from the law. The City submits that both the trial court and the panel majority in the Court of Appeals below were in error in adopting this extreme position.

This Court has held that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *California Motor, supra, quoting Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949). If liability can be premised upon speech when it is integral to conduct which violates a valid statute, then evidence is admissible under *Pennington* despite the fact that petitioning activity is involved. First Amendment considerations have already restricted the purpose for which such evidence can be used, and an adoption of the reasoning of the panel majority below would be "double counting." Indeed, an adoption of the approach of the panel majority below would render meaningless footnote 3 of *Pennington.*

This Court's grant of certiorari would permit it to address an apparent conflict of the Circuits on this issue. Three Courts of Appeals, including the Sixth Circuit in this case, have accorded unique status to First Amendment petitioning activity by barring the use of such evidence to prove the purpose and character of other actions. *Feminist Womens' Health Center v. Mohammed,* 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied on other issues,* 444 U.S. 924 (1979); *Weit v. Continental Illinois National Bank and Trust Company of Chicago,* 641 F.2d 457, 466-67 (7th Cir. 1981), *cert. denied,* 455 U.S. 988 (1982).

On the other hand, several Courts of Appeals have found that evidence of conduct which is not actionable because of *Noerr* is, nevertheless, admissible under *Pennington. Mt. Hood Stages Inc. v. Greyhound Corp.,* 555 F.2d 687, 696 at n.23 (9th Cir. 1977), *vacated and remanded on other grounds* (whether ICC proceeding tolled the statute of limitations), 437 U.S. 322 (1978), *cert. denied after decision on remand,* 449 U.S. 831 (1980) ("*Mt. Hood*"), (using evidence of administrative proceedings in determining a party's intent and the reasonableness of its conduct does not infringe that party's constitutional privilege to seek relief before administrative agencies); *Hays v. United Fireworks Manufacturing Co.,* 420 F.2d 836, 840-41 (9th Cir. 1969) (an instruction that evidence of efforts to influence the passage of legislation and the issuance of licenses could be used only to show purpose and character of other acts assured that the evidence would not be misused to the detriment of the defendant's right to petition.) *See, also,* the cases decided by the Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeal noted below.[24] None

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24. *Alexander v. Nat'l Farmers' Org.,* 687 F.2d 1173, 1195-96 (8th Cir. 1982) (evidence of lobbying state and federal administrative officials admissible to show purpose and character of other activities), *cert. denied,* ..... U.S. ....., 103 S. Ct. 2108 (1983); *MCI Communications v. American Tel. and Tel.,* 708

(Continued on following page)

of these courts has suggested that the fact that the evidence in question was of petitioning activity signaled an unfair prejudice to First Amendment rights which would prevent its use to prove the purpose and character of other acts.

In applying Fed. R. Evid. 403 to exclude the Miller Stipulations, the trial court inverted the Rule 403 balancing test, thereby committing legal error that resulted in a gross abuse of discretion. Rule 403 states that relevant evidence may be excluded if its probative value *is substantially outweighed* by the danger of unfair prejudice. Professors Saltzburg and Redden explain that there is a slight presumption in favor of admitting relevant evidence and "in order to overcome this presumption, the prejudicial effect must be demonstrably greater than the probative value of the evidence." Saltzburg & Redden at 101.

The trial court in this case, however, inverted the required balancing test and used an exactly opposite presumption when it held:

> In the exercise of its discretion, the Court is constrained to conclude at this juncture that the probative value of the proposed stipulations does not outweigh their likely prejudicial effect.

Oral Order, September 19, 1980, Tr. 1265, lines 2-5, App. E at A86; *see also* Tr. 1263, lines 21-23, App. E at A86. The trial court repeated its inversion of the balancing test

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Footnote continued—

F.2d 1081, 1159-60 (7th Cir. 1983) (AT&T's actions before the FCC admissible as evidence of purpose and character of business decisions), *cert. denied*, ... U.S. ....., 104 S. Ct. 234 (1983); *Webb v. Utah Tour Brokers' Ass'n*, 568 F.2d 670, 672 (10th Cir. 1977, as corrected 1978) ("*Webb*") (While proceedings before the ICC and proceedings in a state court injunction action could not violate the antitrust laws under *Noerr*, such proceedings "have evidentiary value as to defendants' objects and motives"); *Household Goods' Carriers Bureau v. Terreli*, 452 F.2d 152, 161 (5th Cir. 1971) (*en banc*) (evidence relating to transactions with the government admissible to show purpose and character of dealings in non-governmental transactions).

when it held that the Miller Stipulations could be introduced "for the limited purpose of demonstrating the purpose and character of the particular transactions under scrutiny upon a showing by the offering party that their probative value outweighs the likely prejudicial effect". Order, May 18, 1981, 538 F. Supp. at 1334, App. F at A100-A101; *see also* Oral Order, August 3, 1981, App. H at A108.

Petitioner submits that by inverting the balancing test enunciated in Rule 403, the trial court could not faithfully perform the function of looking at the evidence in a light most favorable to the proponent, "maximizing its probative value and minimizing its prejudicial effect." *United States v. Brady,* 595 F.2d 359, 361 (6th Cir. 1979), *cert. denied,* 444 U.S. 862 (1979) ("*Brady*"). Petitioner submits further that the trial court's inversion of the balancing test made it impossible for any weight to be given to the requirement that the danger of unfair prejudice *substantially* outweigh the probative value. The trial court's formulation effectively eliminated the concept of substantiality from the balancing test.[25]

Circuit Judge Martin's dissenting opinion below accurately describes the trial court's failure to employ the standard enunciated in *Brady* and *Hans*:

> In this case, the trial judge failed to employ this standard. He did not give any consideration to the probative value of the stipulations despite the fact that this evidence was crucial to the City's case. The jury was instructed that in order to find Cleveland Electric [CEI] had a specific intent to monopolize, a necessary element of an attempt to monopolize violation, it must find not just that "CEI 'wanted to win

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25. In contrast to what the trial court (Krupansky, J.) did in this case, which was approved by the panel majority below, the proper balancing function is described in *United States v. Hans,* 684 F.2d 343, 346 (6th Cir. 1982) ("*Hans*") in an opinion written by Circuit Judge Krupansky following his elevation from the district court to the Sixth Circuit Court of Appeals.

> the competitive struggle' " but that it "intended to remove its opposition by unfair or unreasonable means." The evidence in the Miller Stipulations goes right to the heart of the question of whether Cleveland Electric's means were unfair or unreasonable, particularly when the jury also had before it claims by Cleveland Electric that it was trying its best to comply with the Federal Power Commission order.

Slip Opinion at 21-22, App. A at A23.

The opinion of the panel majority below reflects the limited and erroneous consideration given to the probative value of the Miller Stipulations. While the trial court's charge[26] required proof of intent to remove competition by unfair or unreasonable means, Circuit Judge Wellford's opinion, incredibly, holds that "to cast [the defendant] and its counsel in the role of deceivers" would not be an admissible basis for the introduction of the Miller Stipulations. Slip Opinion at 9, App. A at A9. Petitioner submits that, as Circuit Judge Martin stated in his dissent, "if the jury was inclined to conclude that Cleveland Electric's attorney was acting duplicitously, that is not prejudice, it is common sense." Slip Opinion at 23, App. A at A25. The inconsistency between CEI's covert sponsorship of the Miller lawsuit and its public posture of cooperation would have disclosed, more clearly than anything else in evidence, CEI's state of mind in committing the acts about which the City was complaining.

Further, Circuit Judge Wellford concluded that the Miller Stipulations were cumulative in the light of other evidence and in view of CEI's admission that it sought to reduce and eliminate competition with Muny Light by agreement, purchase, and vigorous competition.[27] Slip

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26. Tr. 19,225, lodged with the Clerk of this Court.

27. CEI's "admission" appears at Tr. 10,248-49, lodged with the Clerk of this Court.

Opinion at 9-10, App. A at A10-A11. In the face of the acknowledgment of CEI's counsel that this admission was not an admission of monopolistic intent[28], both the trial court and Circuit Judge Wellford erred in giving this admission of counsel any weight in deciding to exclude evidence of CEI's contemporaneous conduct. For this Court to allow this ruling to stand will permit defense counsel in the future to have excluded from the jury salient contemporaneous evidence of a party's anticompetitive conduct by the device of a vague in-court admission to something less than the monopolistic intent which the law requires. Persons seeking to enforce the antitrust laws will thereby be deprived of the "legitimate moral force" of their evidence. *See*, 9 WIGMORE ON EVIDENCE, § 2591 (3d ed. 1940).

Petitioner submits that the rationale used by the trial court in excluding the Miller Stipulations from evidence was anathema both to the "purpose and character" evidentiary exception described in *Pennington* and to a proper Rule 403 balancing test. This Court should grant certiorari in this case in order to clarify these matters for the guidance of the lower courts.

2. The Court of Appeals' Decision Conflicts With This Court's Decision in Otter Tail

The concurring judge on the panel majority below, Circuit Judge Merritt, disagreed with the reasoning of Judge Wellford on the admissibility of the Miller Stipulations. Therefore, there was a majority to affirm the trial court's exclusion of the Miller Stipulations only because of Circuit Judge Merritt's conclusion that CEI's secret sponsorship of the Miller suit was "irrelevant to the antitrust case" under *Otter Tail Power Co. v. United States*,

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28. During trial, Mr. Lansdale, counsel for CEI, stated: "The intent that has been admitted by CEI in this case is totally irrelevant to the Section 2 claim being made by the City." Tr. 15,003. A copy of this transcript page has been lodged with the Clerk of this Court.

supra. *See* Slip Opinion at 29, App. A at A31. Because Circuit Judge Merritt's concurring opinion conflicts with this Court's decision in *Otter Tail*, and because the affirmance of the trial court hinged on this conflict, this Court should grant the petition presented here.

The contours of the relationship between federal regulatory law and antitrust law must be carefully drawn. The national economic policy of competition which is embodied in the antitrust laws is a fundamental principle which should not be lightly disturbed. *Otter Tail, supra* at 390-91; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Circuit Judge Merritt's invocation of *Otter Tail* to justify the exclusion of the Miller Stipulations stems from an apparent misunderstanding of both *Otter Tail* and the Miller lawsuit. To allow his reasoning to stand will not only work an injustice in the context of this case, but will substantially contribute to confusion in the developing law of the interface between antitrust and regulation. For this reason, this petition should be granted.

In *Otter Tail*, this Court decided that the authority of the FPC to order interconnections does not create an implied immunity from antitrust liability for electric power companies which refuse to interconnect. *Otter Tail* also established that where an antitrust defendant takes action on its own initiative, which action is not compelled by a regulatory agency, that party may be subject to antitrust liability for its conduct. *Otter Tail*, at 374-75. *Accord, Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

Otter Tail did not present an issue of the evidentiary value, in an antitrust proceeding, of either the determinations of the FPC or the posture of a defendant towards that agency. Decision of that issue is guided by reference to the *Noerr-Pennington* doctrine. For example, *Noerr-Pennington* did not bar a cause of action for price squeeze which was based upon rate filings made with federal and state regulatory agencies. *City of Mishawaka v. American*

Electric Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). Under *Noerr-Pennington*, evidence of a defendant's posture before a regulatory agency is clearly admissible on the issue of motive, intent and purpose. *See, e.g., Mt. Hood, supra; Webb, supra.* Further, where a defendant's alleged wrongful conduct occurs *outside* the regulatory process, there is no question of its admissibility. *See, Mid-Texas Communications v. American Telephone and Telegraph Co.*, 615 F.2d 1372, 1380-81 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1980).

The Miller lawsuit occurred outside the regulatory process with which *Otter Tail* was concerned, and Judge Merritt compounded his erroneous construction of *Otter Tail* by his mischaracterization of the Miller lawsuit as "litigation in the regulatory area." Slip Opinion at 30, App. A at A32. The "regulatory litigation" consisted of the City's application to the FPC for an interconnection, the hearings held on that application, and the review of the orders of the administrative law judge and the full Commission. CEI's public posture in this regulatory litigation was to agree to an interconnection at the FPC (Joint Stipulation No. 230, App. D at A69), and CEI did not take exception to the merits of the FPC order directing the construction of a permanent synchronous interconnection between the two electric systems. *See supra* at p. 5 n.5.

In contrast, the Miller lawsuit did not purport to challenge the FPC orders. The Miller Stipulations and the complaint filed by Charles Miller[29] clearly show that the Miller lawsuit was a taxpayer's suit, filed in state court, which attacked the lawfulness of the proposed interconnection under Cleveland City ordinances and the Ohio common law. CEI did not bring the Miller lawsuit in its own name, and obviously intended to conceal its involvement in the Miller lawsuit. That CEI would take the action

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29. A copy of the complaint in the Miller lawsuit has been lodged with the Clerk of this Court.

which the Miller Stipulations disclose to block the interconnection which it publicly stated that it agreed to, was salient evidence of unlawful intent, and certainly not irrelevant under *Otter Tail*.[30]

3. The Miller Lawsuit Was a Sham Proceeding and the Court of Appeals' Decision Conflicts With This Court's Decision in California Motor

The trial court committed legal error in concluding that the proceeding described by the Miller Stipulations was not a sham proceeding under *Noerr*. The basis of the panel majority's affirmance on this point was its belief that to establish a sham proceeding, the plaintiff must show either "clear abuse of process or repetitive, harassing filing of meritless claims." Slip Opinion at 8, App. A at A9. The Court of Appeals expressed uncertainty as to whether a single lawsuit could constitute a sham proceeding, and seemed to suggest that the court hearing the alleged sham suit itself must find that the institution of the proceeding was an abuse of process, or unlawful, in order for it to be considered a sham exercise of the right to petition. Slip Opinion at 7, App. A at A7-A8. This Court should grant certiorari to clarify that a single suit which a district court finds to be an abuse may be a sham proceeding.

Two decisions by this Court have created uncertainty as to whether a series of lawsuits is required for a sham proceeding. In *California Motor, supra*, this Court held that a sham judicial or administrative proceeding might be shown by various means, including not only the filing of a series of meritless claims, but also practices such as perjury, which need not occur in more than one proceeding. 404 U.S. at 512-13. The plurality and dissenting opinions in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 at 635

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30. In fact, in *Otter Tail*, this Court recognized the relevance of state litigation outside the regulatory process, and remanded for a determination of its admissibility as evidence of unlawful conduct under *California Motor*. *Otter Tail*, 410 U.S. at 379-80.

n.6, 660-62 (1977) suggest that a single suit could be the basis of a sham proceeding, and several courts of appeals have agreed. *E.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau Inc.*, 690 F.2d 1240, 1257 (9th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S. Ct. 1234 (1983); *Energy Conservation Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983). Petitioner respectfully suggests that this Court should grant certiorari here to clarify the law on this issue.

Petitioner also submits that the Court of Appeals erred in holding that the original forum court must have found that the proceeding before it was an abuse in order for "sham" to be later established. This is an unrealistic and unnecessary requirement, particularly since evidence of the abuse may not come to light until after that proceeding is concluded. It is also inconsistent with *California Motor*, where this Court cited *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) to support its conclusion that damages could be based upon fraud in an adjudicative proceeding. In *Walker Process*, this Court reversed the dismissal of the defendant's Sherman Act counterclaim based upon allegations of patent fraud: this Court's ruling clearly anticipated that the fraud determination would be made by the district court which was trying the antitrust claim. Other Courts of Appeals have not required that the court in which the protected conduct took place must have found that the suit was an abuse of process.[31] *E.g., Grip Pack v. Illinois Tool Works Inc.*, 694 F.2d 466, 473 (7th Cir. 1982) (state court's "enigmatic" finding that state suit before it was not malicious does not bar antitrust claim that suit was a sham), *cert. denied*, ... U.S. ....., 103 S. Ct. 2430 (1983);

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31. If the petition for certiorari is granted in this case, petitioner will brief and argue the additional proposition that under applicable Ohio law, the Miller suit was an abuse of process, and therefore clearly a sham proceeding.

Landmark Holding Corp. v. Bermant, 664 F.2d 891 (2nd Cir. 1981).

When the Court of Appeals approved the trial court's exclusion of the Miller Stipulations, it displaced the balance which this Court had struck in *Pennington* between the liberal admission of evidence in antitrust cases and the protection of a defendant's right to petition. It accorded too much deference to First Amendment rights in this setting. It inverted the presumption of admissibility in Rule 403 of the Federal Rules of Evidence and it misconstrued the elements of a sham proceeding. The significance of these errors justifies this Court's grant of the petition presented here.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully urges this Court to grant the City's petition for a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals
For the Sixth Circuit

(Filed May 24, 1984)

No. 82-3053

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF CLEVELAND,
Plaintiff-Appellant,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: MERRITT, MARTIN and WELLFORD, *Circuit Judges.*

WELLFORD, *Circuit Judge*, delivered the opinion of the Court. MARTIN, *Circuit Judge* (pp. 21-28) delivered a separate dissenting opinion. MERRITT, *Circuit Judge* (pp. 29-30) delivered a separate concurring opinion.

WELLFORD, *Circuit Judge.* The City of Cleveland appeals a jury verdict for Cleveland Electric Illuminating ("Cleveland Electric") in this antitrust case. On July 1, 1975, the City sued Cleveland Electric and several other utilities, alleging that they combined to restrain trade,

to monopolize and attempt to monopolize the electric power market in Cleveland and surrounding service areas in violation of sections one and two of the Sherman Act. 15 U.S.C. §§ 1, 2. After the other defendants settled out of the case, the City amended its complaint to charge Cleveland Electric with a section two violation only—monopolization and attempt to monopolize in the relevant market. The first trial ended in a hung jury, the retrial resulted in a jury verdict for Cleveland Electric, and is the subject of this appeal, wherein the City alleges prejudicial and erroneous rulings by the trial court.

A complete recitation of the facts is unnecessary because this court has already published three decisions on interlocutory appeals in this case with ample factual discussion.[1] A limited history will suffice. Municipal Electric Light Plant (Muny Light), the City's utility company, and Cleveland Electric have long been competitors in the electric power business. Cleveland Electric began generating and distributing electric power in the Cleveland area in 1892. In 1906, the City entered the electricity business by purchasing small generating facilities in neighborhoods newly annexed to the City.

Direct competition between the utilities was sparked by the City's construction of a power plant in 1911 and its offer of lower electric rates than Cleveland Electric's. Until the 1930's, Muny Light expanded rapidly, absorbing

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1. *City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123 (6th Cir. 1978) (enforcing summary judgment on CEI counter claims of $13,458,528.48); *City of Cleveland v. Krupansky*, 619 F.2d 572 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980) (denial of writ of mandamus to order more extensive discovery); and *City of Cleveland v. Krupansky*, 619 F.2d 576 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980) (denial of writ of mandamus ordering district judge to recuse himself). *See also City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1227 (N.D. Ohio 1980) (publication of numerous district court orders on major issues throughout the district court litigations).

many of Cleveland Electric's customers, because of its lower rates.

During the following two decades of coexistence, Cleveland Electric adopted and began to implement a policy of eliminating competition within its service area, generally by acquisition. Muny Light became a special target of its attention. In the mid-1960's Muny began actively soliciting Cleveland Electric's customers because its new, 85 megawatt generator gave it the capacity to absorb new business. In response to Muny's expansion efforts, Cleveland Electric developed the "Muny Displacement Program," a corporate policy of providing free rewiring services to customers who switched from Muny to Cleveland Electric service. Cleveland Electric also endeavored to reach a "coexistence" agreement with Muny, whereby Cleveland Electric would supply Muny with a dependable interconnection to Cleveland Electric's power if Muny would raise its rates to Cleveland Electric's level.

At this same time, Muny began to develop problems with its generators which prevented it from supplying reliable service to its customers. Muny's generators, many of which were 25 to 50 years old, needed maintenance service, but no generator could be shut down for service because of the demand for power. Therefore, Muny sought Cleveland Electric's cooperation to construct an interconnection enabling Muny to draw on Cleveland Electric's generators. Muny needed the interconnection because its transmission system was completely surrounded by Cleveland Electric's and because it would need to build 75 miles of high-voltage transmission lines just to reach the other nearest available significant source of power. The utilities negotiated to establish an interconnection, either on a permanent basis or standby, from 1969 to 1972. In early 1973, Cleveland Electric received a direct order from

the Federal Power Commission to interconnect, by means of a 138 kilovolt permanent interconnection. Even after the order, the parties disagreed over the type of the interconnection, as well as the costs for engineering and construction. Muny became seriously indebted to Cleveland Electric for past services, and by 1975 it owed almost $6,000,000.00.[2] These disagreements further delayed the interconnection necessary to Muny's survival as a power-generating utility. In the spring of 1972, a lawsuit by a third party, subsidized by Cleveland Electric, was filed challenging several aspects of the proposed interconnection.

Simultaneous with the interconnection negotiations, Muny was negotiating with the Power Authority of the State of New York (PASNY). Muny intended to purchase low-cost power from PASNY for distribution to its customers. To do this, Muny needed Cleveland Electric to "wheel" the power along its lines from the Pennsylvania border to Cleveland. Cleveland Electric refused. To add to Muny's troubles and its desperate need for PASNY power, the boiler for its 85 megawatt generator exploded in 1974. The explosion was the culmination of a series of malfunctions due to poor maintenance.[3] Muny attempted to repair the generator, but after spending several million dollars, it abandoned the effort. Muny ceased its power generating operations altogether in 1977.

At the time of the first trial, Muny's service area was a thirty square-mile area in the City of Cleveland. Cleveland Electric's transmission system completely over-

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2. This court's prior order indicates that Muny owed Cleveland Electric approximately $13,450,000 as of 1976 not including interest "and the additional charges authorized in the FPC order of January 11, 1973." 570 F.2d at 126.

3. The FPC had found that "[T]he City's past inability to furnish reliable, dependable service on the MELP [Muny] System ha[d] been due primarily to incompetent management and inefficient operation." *See* 570 F.2d at 125.

lapped with Muny's and extended well beyond the borders of Cleveland. Within the overlapping service area, Muny served 43% of the customers and Cleveland Electric served 57%. Muny's rates to private customers throughout its history have been lower than Cleveland Electric's, while Cleveland Electric's service has generally been better.

The City's arguments on appeal, and Cleveland Electric's responses, are complex and varied. In its first, and most significant complaint, the City charges that the trial judge erred when he refused to admit into evidence information about Cleveland Electric's secret sponsorship of a lawsuit challenging the FPC's 1972 order requiring Cleveland Electric to interconnect with Muny Light. Before the first trial, the parties stipulated that Cleveland Electric had, by means of an unnamed Cleveland law firm, induced one Charles Miller to file a taxpayer's suit in the state court system to enjoin the FPC-ordered interconnection between Cleveland Electric and Muny Light. Cleveland Electric never revealed its sponsorship of this litigation, but paid Miller for his troubles and provided him with expert opinion testimony to back his claim. The state court initially granted a temporary restraining order to keep the City from making any payments on work in progress for the interconnection but did not enjoin the work itself. Two weeks later, after holding hearings on the matter, the court dissolved the restraining order and declined to issue a permanent injunction.

The City attempted to introduce the "Miller Stipulations" into evidence at the second trial to demonstrate Cleveland Electric's anticompetitive intent to exclude Muny Light from the retail electric power market.[4] The

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4. The stipulations were admitted at the first trial, but only as rebuttal evidence after witnesses for Cleveland Electric had testified that Cleveland Electric had done nothing to interfere with the interconnection. At the second trial, defense counsel was wise enough not to make the same mistake twice.

trial judge ruled the stipulations inadmissible on the basis of the *Noerr-Pennington* Doctrine. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Under this doctrine, parties are immune from antitrust liability for "mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135. The doctrine is intended to protect the first amendment rights of individuals to petition their government, not limited to the legislative branch, for redress of grievances. *Noerr-Pennington* immunity extends to efforts to influence administrative agencies and the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). *California Motor* also recognized a "sham" exception to the doctrine, where acts are not protected if they are means for achieving "substantial evils" or a deferring of a competitor from "free and unlimited access" to the agencies and courts. *Id.* at 515.

The City argues that this lawsuit falls within this "sham" exception. That Cleveland Electric may have participated, even clandestinely, in a state court suit challenging the manner and means of interconnection ordered by FPC with the intention of gaining some business benefit over or eliminating its competitor, the City of Cleveland and Muny, is not a matter that comes with the "sham exception" recognized in *California Motor Transport Co., supra.*

As stated in *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1175 (10th Cir. 1982).[5]

> The mere fact that Sundstrand may have instituted its prior action against Hydro-Tech with an anti-

5. A case in which Judge John W. Peck of this court participated as a member of the panel.

> competitive intent, *i.e.*, with an intent to gain a business advantage over Hydro-Tech, does not, of itself, bring Hydro-Tech's first claim for relief within the "sham exception" to the *Noerr-Pennington* doctrine.

If Cleveland Electric were substituted for Sundstrand, and the City for Hydro-Tech in the above language, it would be clear that the Miller lawsuit comes within the purview of the *Noerr-Pennington* doctrine. The mere filing of the single lawsuit, even if sponsored by Cleveland Electric with a primary intent to do harm to the City, was not a "sham" action that fits within the exception even if it was a surrepticious seeking to delay and challenge the interconnection, sought by the City. It was not an "interference with the business relationships" of a competitor. *Hydro-Tech, supra; Franchise Realty Interstate Corp. v. S. F. Loc. Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). This Miller suit was not the kind of "baseless, repetitive claims" or "abuse of processes" that barred the City from "access to agencies and courts" as was determined to be the basis of a "sham exception" to *Noerr-Pennington* in *California Transport*, 404 U.S. at 513.[6] The Miller action, if deemed to be that of Cleveland Electric, is not the kind of antitrust activity that is admissible to prove a Sherman Act violation.

The City argues further that the Miller stipulation comes within the "sham" exception because Cleveland Electric concealed its role in promoting the Ohio State Court suit and it was improper for a suit to be brought under the Ohio Code Section involved for the benefit of a private party (Cleveland Electric). The Miller suit was

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6. It is evident that the City had access to administrative agencies and to the courts to assert its claims and complaints against Cleveland Electric; the Miller suit lasted for only a matter of a few weeks, and the interconnection work was not substantially delayed thereby, if at all.

promptly dismissed; appeal was dropped within a short time, and there has been no indication of a finding by the state court itself that institution of the proceeding was an abuse of process or unlawful. Whether a single legal proceeding, even if found meritless, may be considered a basis of a "sham" exception in light of *California Transport* is not altogether clear. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). Other courts have split on this question; *see Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981):

> In *Noerr* and *Pennington, supra,* the Supreme Court held that attempts to influence the legislative process, even though motivated by a desire to reduce or eliminate competition, were protected by the First Amendment. At the same time, however, the Court qualified this immunity by providing that such attempts would be actionable under the antitrust laws where they are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relations of a competitor." *Noerr, supra,* 365 U.S. at 144, 81 S.Ct. at 533. *California Motor Transport v. Trucking Unlimited, supra,* expanded this "sham" exception, stating that "unethical conduct in the setting of the adjudicatory process" or the pursuit of "a pattern of baseless, repetitive claims" cannot seek refuge under the *Noerr-Pennington* doctrine since they constitute an abuse of process "effectively barring . . . access to the agencies and courts." 404 U.S. at 512-13, 92 S.Ct. at 612-613. *Accord, Otter Tail Power Co. v. United States, supra,* 410 U.S. at 380, 93 S.Ct. at 1031 ("repetitive lawsuits carrying the hallmark of insubstantial claims" are unprotected); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6, 97 S.Ct. 2881, 2889, n.6, 53 L.Ed.2d

1009 (1977) ("repetitive, sham litigation may constitute an antitrust violation") (plurality opinion); *see generally* R. Bork, The Antitrust Paradox 359 (1975); Fischel, *Antitrust Liability for Attempts to Influence Government Action: the Bases and Limits of the Noerr-Pennington Doctrine,* 45 U.Chi.L.Rev. 80 (1977). In short, abuse of the administrative and judicial process through unethical lawyer conduct and repetitive filing of insubstantial claims is unprotected by the *Noerr-Pennington* immunity.

Compare, Sage International, Ltd. v. Cadillac Gage Co., 507 F.Supp. 939 (E.D. Mich. 1981). We cannot say that in the absence of a showing of clear abuse of process or repetitive, harassing filing of meritless claims that the trial judge acted erroneously in holding that the stipulated Miller suit was not admissible.

Nor can we conclude that the trial court committed error under all the circumstances in excluding the stipulation from evidence although the City alleged that it would show Cleveland Electric's "purpose" or the "character" of its action in assisting and subsidizing Miller to bring the state court action. As before discussed, even if the purpose were anti-competitive, and the suit were designed to eliminate the City as a competitor, "[s]uch conduct is not illegal, either standing alone or as a part of a broader scheme . . . ." *Mine Workers v. Pennington* at 670. The City's effort to introduce the evidence was to show the anticompetitive character and nature of Cleveland Electric's conduct in this episode as a part of the alleged broader pattern of conduct condemned by the Sherman Act, and to cast appellee and its counsel in the role of deceivers. This is not an admissible basis for its introduction in our view. Under Fed. R. Evid. 403, moreover, we believe the court was acting within the permissible

bounds of discretion to exclude this evidence by reason of "the danger of unfair prejudice," confusing or misleading the jury, or because the evidence was cumulative. The trial court is to be given "very substantial discretion" in balancing between "probative value on the one hand" and "unfair prejudice" on the other in deciding whether or not to admit tendered evidence subject to objection. Judicial self-restraint is appropriate in these circumstances. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978); *United States v. Zipkin*, ... F.2d ..... (6th Cir., No. 83-3042, March 7, 1984) (slip opinion at 11).

As pointed out by the City's counsel in appellant's brief at p.13, "CEI [Cleveland Electric] *admitted at trial* that it had been a CEI *objective* to reduce and *eliminate* competition with its competitor, Muny Light, although CEI carefully avoided any direct admission of antitrust liability," and that among the means of accomplishing this objective, "CEI sometimes sought to *avoid doing* and, in any event, did not wish to do things which would help Muny Light to compete more effectively." (Emphasis added). There was considerable proof introduced by the City to show that Cleveland Electric, despite its protestations to the contrary, delayed in effecting interconnections, even those ordered by FPC. There was also evidence, of which the trial court was aware, of attempts to get Muny Light to raise its rates by agreement, efforts to dislodge the City as a competitor by the Muny Displacement program, delaying tactics on furnishing standby power and avoiding interconnections and misleading Muny Light in that respect, refusal to "wheel," opposing the City's efforts to obtain FPC assistance, and the like. In view of this other evidence, and Cleveland Electric's stipulated objective, this effort through Miller, described in

Muny Light's brief (p. 43) as "its evasion of the City's request for an interconnection . . . done with the intent to maintain and enhance its market position" was simply cumulative in its effect.[7]

Considering the Miller stipulation "in a light most favorable to its proponent [the City], maximizing its probative value and minimizing its prejudicial effect,"[8] we cannot find an abuse of discretion in its exclusion.

Not only was the Miller stipulation evidence cumulative in its effect, but also to admit it even for a limited purpose of rebutting the testimony of Cleveland Electric's Donald Hauser was to expose the jury to the danger of considering that proof for improper purposes—that of an anti-competitive act when it was not admissible for that purpose. *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979). If we were to conclude, on the other hand, that the exclusion were an abuse of discretion, in light of the merely cumulative impact of that proof, and because the actual adverse effect of the suit upon Muny Light was insubstantial, we would not reverse the judgment rendered below on that account, because we deem it not sufficiently prejudicial to the City.

The City also contends that the trial judge erred in not granting collateral estoppel effect of certain findings of fact made in proceedings before the Nuclear Regulatory Commission (NRC). These proceedings began in 1974 in

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7. The City said, at p. 42 of its brief, that "the Miller suit was brought to block the construction of the pole line to be used for an interconnection between Muny Light and CEI."

8. In considering whether evidence should be excluded under Fed. R. Evid. 403, this court has directed the quoted standard. *See United States v. Hans*, 684 F.2d 343, 346 (6th Cir. 1982), quoting *United States v. Brady*, 595 F.2d 359, 361 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979).

connection with applications by Cleveland Electric and four other utilities for licenses to build and operate nuclear power plants. Before issuing any such licenses, the Commission is required to make a determination, among other things, as to whether their issuance "would create or maintain a situation inconsistent with the antitrust laws." 42 U.S.C. § 2135(c)(5). Both the Justice Department and the City of Cleveland intervened in the proceedings to complain that Cleveland Electric and the other utilities had violated the antitrust laws in the past and that granting them licenses to operate the requested nuclear plants would maintain a situation inconsistent with the Sherman Act. After extensive hearings, the Commission's Licensing Board agreed with the City and the Justice Department. The Board found, among other things, as follows:

> CEI's offer to interconnect [in the 1960's] was motivated by a desire to forestall construction of greater generating capacity by the City. The record is replete with references to CEI's avowed policy to eliminate MELP as a competitor. The offer here constituted a means toward that end.
>
> [I]t was CEI's private intention to avoid a permanent parallel interconnection.
>
> CEI delayed in reaching a mutual agreement on an intertie.
>
> On July 8, 1971, CEI agreed to begin a study of a permanent synchronous interconnection. With a permanent, synchronous intertie now being inevitable, CEI sought to maximize Cleveland's economic burden. A CEI brainstorming session concluded that a two step approach would accomplish this . . . .
>
> Originally, the 11 kv load transfer arrangement was set up to supply Cleveland with maintenance power

while MELP installed environmental control equipment on its boilers. After this was accomplished, CEI refused to supply MELP anything other than emergency power. When Cleveland needed power from CEI, the load transfer was operated in such a way as to cause an outage on MELP's system. From an operational viewpoint no outage need have occurred. CEI imposed severe operating problems, unnecessary restrictions and administrative delays on MELP before it could utilize the transfer system.

Administrative delays by CEI in energizing the 69 kv were worse than the delays encountered with the 11 kv system. Connection at 69 kv required CEI executive clearance and would at times require up to 12 hours notice before CEI would take any action on MELP's request. MELP's system would experience brown outs, blackouts, or voltage reductions while awaiting CEI approval of a request for power over the 69 k tie.

It would be impractical for Cleveland to construct transmission lines across CEI territory because of (1) cost, (2) environmental problems, and (3) the unlikelihood of obtaining siting approval for what would be duplicating transmission facilities.

Despite these findings the NRB granted Cleveland Electric the requested licenses to build the plants, subject to certain conditions intended to help the competitive situation between Cleveland Electric and Muny Light.

The NRB granted Cleveland Electric a favorable decision, although conditional, as indicated under 42 U.S.C. § 2135(6) and (8). The findings indicated were made in the context of whether or not the license should be granted Cleveland Electric as one of the considerations involved in the Commission's ultimate decision under the Atomic Energy Act.

In *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) the Court found that it was appropriate for the doctrine of collateral estoppel to be applied offensively by a private plaintiff following court proceedings instituted against the defendant, Parklane Hosiery, by the SEC. The identical issues involving false representations in a proxy statement had previously been decided judicially both by a district court and affirmed by a U.S. Court of Appeals as a matter of factual findings and legal conclusions. The nub of the holding, however, was that the decision whether or not to apply collateral estoppel was left to the *broad discretion* of the district judge under the applicable circumstances:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.

Id. at 331 (footnote omitted).

Different procedures and burdens of proof apply in an administrative proceeding where Cleveland Electric was an applicant in one instance before the Nuclear Regulatory body, and in the district court where it was a defendant in a jury trial accused of antitrust violations. Furthermore, in an earlier administrative proceeding, the FPC had made contrary factual findings related to alleged anti-competitive conduct by Cleveland Electric. In addition, the district court was uncertain as to the effect of certain irregular circumstances that surrounded the determination of the Commission in its review of the Board's initial decision. Finally, the agency decision sought to be applied by the City through collateral estoppel was not a final decision. A "valid and final judgment" is necessary before collateral estoppel can be invoked. *Ashe v. Swenson,* 397 U.S. 436,

443 (1970). A finding of antitrust violations or conduct, moreover, is not within the special expertise of the Nuclear Regulatory bodies. For all these reasons, it was within the broad discretion of the district court to decide whether collateral estoppel should have been applied, and we find no abuse of discretion demonstrated under these circumstances by the district court's ruling not to apply it in this case.[9]

The City also takes issue with a number of the jury instructions given in this case. In general, we find the City's arguments to be without merit. First, the City complains that the trial judge improperly excluded from jury consideration wholesale electrical power as a relevant product market. We disagree. We agree with the trial judge that the only relevant product market in this case is the *retail* electrical power market. This is the only market in which Cleveland Electric and the City currently compete and the only market in which they are ever likely to compete. In defining a relevant product market, the goal is "to delineate markets which conform to areas of effective competition and to the realties [sic] of competitive practice." *L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971). The City offered no evidence that it ever had competed or ever intended to compete in the wholesale power market. Moreover, even if the trial judge had designated wholesale power as a relevant market, the City's position would not have improved. The evidence

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9. Neither *Montana v. United States*, 440 U.S. 147 (1979), nor *United States v. Utah Construction Co.*, 384 U.S. 394 (1966), relied upon by the City, compel a different conclusion. *Montana* involved the application of collateral estoppel within the context of res judicata where there had been a prior valid and final court decision on the legal and factual issues involved. *Utah Construction* involved a contractual provision which made a decision by the Contract Appeals agency binding and thus this agreement collaterally estopped the contractor's seeking a contrary court decision in a subsequent proceeding.

shows that there were a number of other potential sources of wholesale power in the region in addition to Cleveland Electric, *e.g.*, PASNY, Ohio Edison, and PENELEC. Cleveland Electric clearly had neither monopoly power in this market nor a dangerous probability of acquiring such a monopoly.

The City also claims that the trial judge's exclusion of the wholesale power market foreclosed the jury from considering whether Cleveland Electric used its monopoly of transmission lines to achieve a competitive advantage in the retail power market in violation of the Sherman Act. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). This is not true. The trial judge specifically charged the jury that it could find that Cleveland Electric's refusal to wheel power over its lines to Muny Light was a violation of the antitrust laws, as a denial of access to an essential facility. *See e.g., Associated Press v. United States*, 326 U.S. 1 (1945); *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1980) (as amended on denial of rehearing); *Gamco, Inc. v. Providence Fruit & Produce Building*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952). Perhaps it would have been appropriate to also instruct the jury that it was unlawful for a monopolist to use its monopoly power in one area to obtain a monopoly in another. However, there is no evidence that the City ever asked for such an instruction at trial. Moreover, the "essential facility" doctrine is sufficiently similar to the "monopoly leverage" doctrine that the jury had ample opportunity to consider the issue.

The City next contends that the trial judge erred in his instructions on the relevant geographic market. In particular, the City objects to the judge's instructions that the jury could not make Cleveland Electric's entire service area the relevant market and that it could not consider

price influence when determining geographic market. The basic rule in establishing the relevant geographic market is that the market selected must "both 'correspond to the commercial realities' of the industry and be economically significant." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962). What this usually boils down to in practice is the area of actual or potential competition between the parties involved in the case. *See Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988-89 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *American Football League v. National Football League*, 323 F.2d 124, 129-30 (4th Cir. 1963). While there have been instances where the geographic market has been defined as the defendant's service area, *see e.g., Otter Tail Power, supra*, 410 U.S. at 369-70; *City of Mishawaka v. American Electric Power Co.*, 465 F. Supp. 1320, 1325-27 (N.D. Ind. 1979), *aff'd in relevant part*, 616 F.2d 976 (7th Cir. 1980), the courts in these cases have emphasized the existence of actual or potential competition throughout the defendant's service area. In *Mishawaka*, for example, the competition came from the nine plaintiff cities who operated municipal power plants scattered throughout the defendant's service area. In *Otter Tail*, the competition was provided by several towns which operated their own power systems, several more which wanted to, and a host of additional cities which might want to in the future. *Otter Tail* is also somewhat unique because the plaintiff in the case was the United States government, and, as such, it represented the interests of all cities whether parties to the litigation or not.

Without some kind of competition limitation on the relevant geographic market, some very anomalous results could be created. For example, we can imagine a situation in which one of the large regional telephone companies

(one of the "fragments" remaining after the Bell System breakup) was competing with a local telephone company to provide service to a new town. It is possible that the local phone company might control 90% of the telephone business in the county where the new town is to be built. Yet, if we were to define the relevant geographic market as the service area of the regional phone company, the regional phone company would have monopoly power and would be subject to the special standard of business conduct applicable to its situation. This, we believe, is not a result intended by the antitrust laws and certainly not one that we will endorse.

In this case, the City introduced no evidence that it actually was competing for or ever planned to compete for customers in Cleveland Electric's entire 1700 square-mile service area. There was in the record evidence that the City was attempting to expand its operations beyond its 30 square-mile base in Cleveland, and that it was authorized to sell up to one-third of its power to areas outside of Cleveland. However, these proposed expansion activities could never provide effective competition throughout Cleveland Electric's entire service area. Therefore, it was proper for the trial judge to instruct the jury that the relevant geographic market was something less than Cleveland Electric's entire service area.

The trial judge was also correct in instructing the jury not to consider the effect, if any, of the City's electric rates on Cleveland Electric's rates when defining the geographic market. These instructions ruled out jury consideration of the so-called "price influence" theory. According to this theory, the area of effective competition between two companies for a particular product can be determined, in part, by the way each company alters its prices in response to price changes made by the other.

So, for example, two regional manufacturers of cement who do not normally sell in each other's area might be considered part of one larger geographic market if a price change in one area was matched by a price change in the other. In this situation, presumably transportation expenses are low enough so that a failure to match a competitor's price change would result in a flow of product from the less expensive area into the more expensive one, resulting in a loss of business for the manufacturer with the higher price. *See, e.g., RSR Corp. v. Federal Trade Commission,* 602 F.2d 1317 (9th Cir. 1979); *cert. denied,* 445 U.S. 927 (1980); *United States v. Bethlehem Steel Corp.,* 168 F. Supp. 576 (S.D.N.Y. 1958). However, as Cleveland Electric correctly points out, this price influence theory only makes sense when suitable means of transportation exist from one area to the other. Because Muny Light lacks the distribution network to move electricity rapidly to Cleveland Electric customers dissatisfied by Cleveland electric rate hikes, the price influence theory is not applicable in this case. Therefore, even though the City argued that its lower prices placed heavy political pressure on Cleveland Electric not to raise its rates elsewhere, this kind of price influence should not have been considered by the jury because it did not relate in any way to the City's ability to compete with Cleveland Electric for customers. Were we to decide otherwise, a decision by a Chicago-based utility not to raise rates because other cities, like Cleveland were managing to avoid such increases, would create a basis for Cleveland (or Cleveland Electric) to argue that the relevant geographic market for electricity extended all the way to Chicago.

The last jury instruction objected to by the City involves the trial judge's instruction on the effectiveness of regulation. The trial judge told the jury to presume that

the Ohio utility regulatory commission properly exercise its authority to regulate Cleveland Electric's rates. From this, the City argues that the jury could conclude that state regulation protected Cleveland Electric from antitrust liability at least as relates to one aspect of monopoly power, the ability to control prices. According to the City, this is contrary to the holding of the Supreme Court in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976). In that case it was held that electric utilities are subject to the antitrust laws even when their actions are approved by state utility commissions. *See also, e.g., MCI Communications v. AT&T*, 708 F.2d 1081, 1103 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); *IT&T v. Gen. Telephone & Electronic Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975) ("regulation must be assessed simply as another fact of market life"); *United States v. AT&T*, 524 F. Supp. 1336 (D.C.D.C. 1981). Nonetheless, even if the City is correct in its objections, the trial judge's error was harmless because the City's case against Cleveland Electric was not based on Cleveland Electric's ability to control prices,[10] but rather on its ability to exclude competition, the second test of monopoly power.

The City also challenges the trial judge's orders limiting discovery in this case. In considering the City's claim we are aware, of course, that the trial judge has broad discretion in ruling on discovery matters. *See Chrysler Corporation v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). His decisions in this area will be upheld unless we find that they constitute "a gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 344 (8th Cir. 1979),

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10. It is conceded that Muny Light's rates were lower than Cleveland Electric's rates through the relevant period.

quoting *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977). We find no such abuse here. There is ample evidence in the record that the City was simply remiss in failing to comply with reasonable discovery deadlines established by the trial judge. While the City may have been unable to obtain information it considered important to its case, its problems were largely self-inflicted. Moreover, our review of the record demonstrates that all issues in this case were fairly and vigorously contested. Any errors which the trial judge may have made in his discovery rulings, therefore, did not create the kind of "fundamental unfairness" which would justify a reversal.

In its final challenge on appeal, the City alleges that the trial judge improperly directed a verdict that Cleveland Electric was not liable for damages resulting from Muny Light's decision not to rehabilitate its 85 megawatt generating plant. The generator was originally put out of commission by an explosion in its main boiler. The City admitted that Cleveland Electric's conduct did not cause the original explosion. The City does, however, argue that Cleveland Electric's refusal to interconnect with Muny Light was instrumental in the decision not to repair the unit. There is no evidence in the record to support this contention. The City established that it began repairs on the unit, spent two million dollars, then decided not to finish. It did not offer any explanation as to *why* it abandoned the repair effort. As a consequence, any jury finding that the termination of the repair effort was caused by an unlawful act of Cleveland Electric would be based on "mere suspicion, conjecture, and speculation" and could not be upheld. *See Miller v. New York Produce Exchange*, 550 F.2d 762, 767 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977). Therefore, the district judge properly directed a verdict on this issue.

For the reasons indicated, we AFFIRM the judgment of the district court. Each party to bear its own costs on appeal.

BOYCE F. MARTIN, JR., *Circuit Judge,* dissenting. This is a complicated case with a complicated past. It presents a number of difficult antitrust issues in a unique setting. Moreover, it has already been before a jury twice, and a reversal by this Court would require yet another trial. For these reasons, I can sympathize with the majority's desire to uphold the trial judge's rulings and dispose of the case once and for all. Nonetheless, where, as here, the trial judge has committed clear error, I believe this Court has an obligation to reverse and remand no matter what the consequences. Accordingly, I must dissent as to the majority's rulings on both the admissibility of the Miller Stipulations and on the collateral estoppel effect to be given the findings of fact by the Nuclear Regulatory Commission.

On the Miller Stipulations issue, I conclude that the district court erred in excluding the Miller Stipulations from evidence because they were admissible to show "the purpose and character of the particular transactions under scrutiny." *United Mine Workers v. Pennington,* 381 U.S. at 670 n.3 (1965). Under this caveat to the *Noerr-Pennington* doctrine, acts which are not in themselves actionable under the antitrust laws nonetheless can be admitted into evidence if "probative and not unduly prejudicial." The test here is the same as that under Fed. R. Evid. 403. Under this standard, the trial judge is required to view the evidence "in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States v. Hans,* 684 F.2d 343, 346 (6th Cir. 1982), quoting from *United States v. Brady,* 595 F.2d 359, 361 (6th Cir. 1979).

In this case, the trial judge failed to employ this standard. He did not give any consideration to the probative value of the stipulations despite the fact that this evidence was crucial to the City's case. The jury was instructed that in order to find Cleveland Electric had a specific intent to monopolize, a necessary element of an attempt to monopolize violation, it must find not just that "CEI 'wanted to win the competitive struggle'" but that it "intended to remove its opposition by unfair or unreasonable means." The evidence in the Miller Stipulations goes right to the heart of the question of whether Cleveland Electric's means were unfair or unreasonable, particularly when the jury also had before it claims by Cleveland Electric that it was trying its best to comply with the Federal Power Commission order.

Moreover, in considering the prejudicial effect of the evidence, the trial judge did not look to what is normally considered prejudice in an evidentiary setting, that is, whether or not the evidence would inflame the jury's passions against the defendant or otherwise make it decide the case on a basis unrelated to the merits, but rather to whether admission of the evidence would prejudice Cleveland Electric's first amendment rights. *See City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1257, 1278-79 (N.D. Ohio 1981) ("To adopt the City's position would emasculate and indeed gut the constitutional protection afforded under the *Noerr-Pennington* doctrine and have a 'chilling effect' upon the exercise of First Amendment rights.") While I am aware that another court has apparently adopted a similar approach, *see Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), I do not believe that this was the test laid down by the Supreme Court in *Pennington* when it said that such evidence was admissible if

> probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

Pennington, supra, at 670 n.3. The way I read this language, decisions about probative value under *Noerr-Pennington* are to be made just as they would in any other case.

Moreover, even if I were to agree with the trial judge's formulation of what constitutes prejudice in this case, the deference which he gives to first amendment rights is much too absolute. If, given the significance of the Miller Stipulations to its case, the City's attempt to take advantage of the evidentiary exception to *Noerr-Pennington* will "gut" the protections afforded by *Noerr-Pennington,* it is difficult to think of any attempt which would not.

I note that Cleveland Electric, on appeal, attempts to justify the trial judge's decision to exclude the Miller Stipulations based on traditional probative/prejudice calculations. It does not succeed. It argues first that the probative value of the stipulations was slight because merely cumulative, Cleveland Electric having already admitted that it desired to eliminate competition between itself and Muny Light. Cleveland Electric also claims that the Miller Stipulations would be highly prejudicial because they would "impugn" the character of its general counsel, who had written a letter to Muny Light stating that he would be happy to work with the City on the interconnection while, at the same, time, recruiting Mr. Miller to file his lawsuit against the interconnection. I

have already stated my belief that the evidence was highly probative. As to Cleveland Electric's claim of prejudice, if the jury was inclined to conclude that Cleveland Electric's attorney was acting duplicitously, that is not prejudice, it is common sense.

Accordingly, because I find no justification whatever for the exclusion of the Miller Stipulations from evidence, and because I find that this evidence was a crucial part of the City's case, I would reverse the trial judge on this issue and remand the case for a new trial.

I also believe that the trial judge erred in not granting collateral estoppel effect to the findings of fact made in proceedings before the Nuclear Regulatory Commission.

It is well-settled that collateral estoppel effect can be given to final decisions of administrative agencies. *See Kremer v. Chemical Construction Co.*, 456 U.S. 461, 484 n.26 (1982); *United States v. Utah Construction Co.*, 384 U.S. 394, 422 (1966). The doctrine may, however, be more selectively applied in the administrative context. *See United States v. Lasky*, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). In any event, "Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Tipler v. E. I. duPont deNemours and Co.*, 443 F.2d 125, 128 (6th Cir. 1971). The trial judge gave four different rationales for his refusal to give collateral estoppel effect to the Commission's findings: (1) the Commission's findings conflicted with findings on the same issues made by another administrative agency, the Federal Power Commission; (2) it was impossible to determine the specific factual findings underlying the Commission's decision because of the irregular manner in which the Commission's Appeal Board issued its decision;

(3) the statutory mandate of the Nuclear Regulatory Commission is different from that of a federal court sitting in an antitrust action; and (4) the decision of the Commission was not final. Because I disagree with the trial judge's conclusions,[1] and because I do not believe that giving collateral estoppel effect to the Commission's findings of fact would "contravene public policy or result in manifest injustice," I would give collateral estoppel effect to the Commission's findings of fact.

The initial argument against using collateral estoppel is based on the conflicting factual findings of the Nuclear Regulatory Commission and the Federal Power Commission. According to the trial judge, because each agency's findings should be entitled to the same collateral estoppel effect, neither can be given any. I disagree. As the trial judge's own order acknowledges, the factual findings made by the Federal Power Commission relative to alleged anti-competitive conduct were not at all essential to its ultimate decision, that a temporary, emergency interconnection should be built between Cleveland Electric and Muny Light. *See City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1227, 1234 (N.D. Ohio

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1. I note that the district judge believed that he was entitled to exercise "broad discretion" in deciding whether to employ collateral estoppel. *See City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1227, 1232 (N.D. Ohio 1981). The majority seems to agree. However, in the case which is cited for this proposition, *Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), the Supreme Court was referring only to decisions concerning the use of so-called "offensive" collateral estoppel. In such cases, where there is no mutuality between the parties, the Court recognized that there could exist many complicating circumstances that would make the imposition of collateral estoppel unfair in particular cases. The Court's solution to this problem was to give the trial judge broad latitude in considering whether to apply the doctrine in a given case. When, as here, there is mutuality between the parties, these considerations do not apply. The decision to invoke or not to invoke collateral estoppel becomes a question of law, and like all such questions, is freely reviewable by this Court.

1980). If a factual finding is not essential to an agency decision, it is not entitled to be given collateral estoppel effect. *See United States v. School District of Ferndale,* 577 F.2d 1339, 1349 (6th Cir. 1973); *Continental Can Co., U.S.A. v. Marshall,* 603 F.2d 590, 594-5 (7th Cir. 1979); 1B *Moore's Federal Practice* ¶ 0.441[2], at 729-30 (2d ed. 1974). The statute pursuant to which the Federal Power Commission issued its order authorizes the Commission to require interconnection when it is in the public interest. 16 U.S.C. § 824a. The Commission found that the unstable nature of Muny Light's generating system required that an interconnection be built. The City had also argued that the public interest required the interconnection because Cleveland Electric was operating in an anti-competitive manner. The administrative law judge rejected these contentions, but this rejection clearly was not necessary to his ultimate decision, because he had already concluded that an interconnection was necessary. Moreover, as the City points out, the Federal Power Commission hearings were conducted in March, 1972, and did not consider evidence of Cleveland Electric's conduct after that time which was available to the Nuclear Regulatory Commission at its hearings. Finally, there was no full and fair hearing on the anticompetitive issues as is required to actuate the doctrine. *See id.,* at ¶ 0.441 [3.3]; *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 480-81 (1982).

The second reason given to deny collateral estoppel effect was the irregular circumstances surrounding the issuance of the Commission's decision. After the Licensing Board made its initial decision, Cleveland Electric and the other utilities appealed to the three-member, Nuclear Regulatory Commission Appeal Board. One member of that Board, Mr. Sharfman, wrote an opinion affirming in relevant part the Licensing Board's determinations and

its findings of fact. However, before the other members could complete their review of his opinion, Mr. Sharfman left the Appeal Board and entered the private practice of law. To avoid any appearance of impropriety, the remaining members did not discuss the case further with Mr. Sharfman. They wrote a separate opinion generally concurring in Sharfman's opinion, but with certain exceptions, particularly as regarded relief. The trial judge found that certain language in their concurring opinion made it impossible to decide just what the three members were agreeing to:

> Had Mr. Sharfman remained a member of this Board, or continued to be available for consultation, we might well have suggested revisions in his treatment of certain issues and have endeavored in other respects to persuade him of the correctness of our views (particularly on the question of relief) to the extent that they do not coincide with his. Those options have not been open to us. In the circumstances, we file his opinion as it was presented to us. We concur in its ultimate factual and legal conclusions and the result it reaches except where indicated in our separate opinion, which follows immediately.

I do not share this uncertainty. The other two members specifically stated that they concurred in Sharfman's "ultimate factual and legal conclusions" except where indicated in their separate opinion. That separate opinion shows no disagreement with any of the factual findings at issue here. Therefore, I do not agree that this provides a sufficient basis for declining to apply collateral estoppel.

The trial judge also declined to give collateral estoppel effect to the Nuclear Regulatory Commission's findings because he found that the statutory mandate of the Com-

mission differed significantly from that of a federal court sitting in an antitrust case. I do not agree with this argument, either. The statute at issue, 42 U.S.C. § 2135 (c) (5), directs the Commission "to make a finding whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws." In order to do that, the Commission must examine the past conduct of the utilities to determine if they have committed antitrust violations. This is exactly the task of the trial judge in a Sherman Act monopolization case.

The cases cited by the trial judge are readily distinguishable. In *Tipler v. E. I. duPont deNemours and Co.*, 443 F.2d 125 (6th Cir. 1971), this Court was presented with a situation in which the statutory mandates truly were different. The defendant was asking the Court to grant collateral estoppel effect in a Title VII race discrimination case to a NLRB finding that an employee was fired for cause and not for his union activities. The Court properly held that because the NLRB's task was to determine only if union activities led to the employee's discharge and not whether he was dismissed because of his race, it would not give collateral estoppel effect in the Title VII race discrimination case to the NLRB's decision that the employee was properly discharged for cause.

The trial court also cited as support for its order a decision by another Nuclear Regulatory Commission Licensing Board refusing to grant collateral estoppel effect to a federal district court's conclusion that certain utilities were not guilty of antitrust violations. *See In Re Matter of Houston Lighting & Power Co.*, 10 N.R.C. 563 (1979), *aff'd by Appeal Board*, 11 N.R.C. 14 (1980). This case is also not relevant. There, the Nuclear Regulatory Commission was refusing to apply collateral estoppel to a conclusion of law by the district court, that there was no

antitrust violation, and not to the findings of fact. In addition, there actually were different legal standards involved. The district court's decision considered only section one, conspiracy allegations whereas the Nuclear Regulatory Commission was prepared to consider section two, monopolization and section five, unfair trade practices charges. In our situation, the Commission concluded that Cleveland Electric had committed section two, monopolization and attempt to monopolize violations. These are the issues that would be tried on remand, and it is only the factual findings which support those conclusions that the City seeks to have granted collateral estoppel effect.

Finally, the trial judge found that he could not give collateral estoppel effect to the Appeal Board's findings because the agency's decision in the case was not final. Cleveland Electric and the other utilities had petitioned the full Commission to review the Appeal Board's decision. The Commission cannot change the Appeal Board's findings of fact, but it can change its conclusion of law. Moreover, any decision by the full Commission could be appealed to the federal court of appeals. *See* 42 U.S.C. § 2239, 28 U.S.C. § 2342. A final decision is necessary before collateral estoppel can be invoked. *See Ashe v. Swenson,* 397 U.S. 436, 443 (1970). Nevertheless, because neither party raised this issue on appeal, I assume that the Commission's decision has indeed become final. In any event, the passage of time would cure any questions about finality if this case were heard on remand.

For these reasons, then, I would grant a new trial.

MERRITT, *Circuit Judge,* concurring. I agree with the result reached in the opinion written by Judge Wellford and with its reasoning on the issues other than the admissibility of Cleveland Electric's conduct in the *Miller*

lawsuit. By sponsoring the *Miller* lawsuit, Cleveland Electric sought to avoid the consequences of an order of the FPC requiring interconnection with the City's light company. My view that this conduct is irrelevant to the antitrust case is based on the Supreme Court's opinion in *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973).

The Supreme Court decided in *Otter Tail* that the authority of the Federal Power Commission to order interconnection does not create an immunity for electric power companies from antitrust regulation. In *Otter Tail,* the Supreme Court said that determinations of the FPC are in the main separate from and irrelevant to antitrust regulation. The FPC may order electric utilities which come before it to take certain actions in the public interest, and its orders may be informed by antitrust considerations if they are relevant; but, under the reasoning in *Otter Tail,* the two regulatory schemes—federal power regulation under the jurisdiction of the FPC and antitrust regulation under the federal courts—are otherwise entirely distinct. Given this, it seems improper to allow evidence of a party's efforts to avoid the enforcement of an FPC order to which it takes exception to be used against that party in a private antitrust action.

Antitrust questions concerning preemption, the state action exemption, and exclusive and primary antitrust jurisdiction in connection with the regulation of utilities are legal questions. Resistance to a non-antitrust, FPC administrative order may give rise to administrative contempt proceedings, but I would not allow such resistance to create an inference of anti-competitive intent or to be used to allow a jury to impose antitrust liability. A competitor should have to prove his antitrust case without regard to the non-antitrust litigation before the administrative agency or in the courts concerning the administrative agency's ac-

tions. For this reason, I believe the District Court was correct in excluding evidence concerning the *Miller* case.

In other words, if as *Otter Tail* held, orders of the FPC respecting interconnection and wheeling of electric power are not primary do not insulate a utility subject to those orders from antitrust liability, I do not see why resistance to those orders through further litigation should be allowed to be used to create an inference of anticompetitive intent on the part of Cleveland Electric, as Muny Light argues. In my view, the issue goes beyond the *Noerr-Pennington* doctrine. It is an issue of basic fairness and reciprocity. If FPC regulatory litigation and orders do not displace antitrust litigation because the two are viewed as separate regimes of law, why should litigation in the regulatory area be used to establish antitrust liability?

Issues involving the relationship between antitrust enforcement and administrative regulations are especially complex and difficult:

> Because the problem is so complex, the doctrines that the courts have fashioned to deal with it are, not surprisingly, tools of less than surgical precision. Moreover, the doctrines simply are not applied with any discernible consistency.

6 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 44A.01[1](1983). If these issues are confusing for courts, how can we expect a jury rationally to decide on the antitrust consequences of a competitor's resistance through litigation of an order of interconnection by an administrative agency, an order not based on antitrust considerations? Admission of such evidence would simply confuse the jury.

APPENDIX B

Motion of Plaintiff, City of Cleveland, for an Order in Limine

(Filed October 26, 1979)

Civil Action No. C75-560

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff,
v.
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.,*
Defendants.

MOTION OF PLAINTIFF FOR AN ORDER IN LIMINE TO FIND CERTAIN FACTS CONCLUDED AND TO BAR THE INTRODUCTION AT TRIAL OF ANY EVIDENCE INCONSISTENT WITH SUCH FACTS

Now comes the Plaintiff, the City of Cleveland ("City"), by and through its counsel, and moves this honorable Court for an Order *In Limine* (a) to find concluded for the purposes of this litigation all findings of fact which have been finally adjudicated by the Nuclear Regulatory Commission as forth in Appendix I attached hereto and (b)

to bar the introduction at trial of any evidence which is inconsistent with such finally adjudicated findings of facts.

Respectfully submitted,

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APPENDIX C

Order of the United States District Court

[Published at 538 F. Supp. 1227]

(Filed January 15, 1980)

Civil Action No. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
Defendants.

MEMORANDUM AND ORDER

KRUPANSKY, J.

Presently before the Court is the City of Cleveland's Motion for an Order in Limine whereby said plaintiff urges the Court to accord conclusive effect in the instant proceeding to certain factual determinations made by the Atomic Safety & Licensing Board of the Nuclear Regulatory Commission ("NRC"), as affirmed by the NRC's Atomic Safety & Licensing Appeal Board, and to bar introduction at trial of any evidence inconsistent with such facts. Ignoring this Court's previous rulings to the contrary, plaintiff currently urges the Court to invoke the doctrine of collateral estoppel in order to preclude here-

in the relitigation of factual matters resolved in the course of licensing proceedings before the aforementioned subsidiary boards of the NRC. Defendants have responded in opposition to the instant motion.

On three separate occasions, this Court has considered and rejected the contention that the doctrine of collateral estoppel is properly applied to the administrative determinations of the NRC and/or the Federal Power Commission ("FPC"). Thus, by Memorandum and Order issued February 15, 1978, the Court, in denying defendant CEI's Motion for Partial Summary Judgment and for an Order in Limine, expressly declined to apply in the instant proceeding either the doctrine of res judicata or that of collateral estoppel to the administrative determinations of the FPC. A review of this Court's decree discloses that the foregoing resolution was predicated in significant part upon the fact that administrative proceedings before the NRC and FPC had produced entirely discordant and inconsistent findings. The Court reasoned:

> One final consideration which merits review significantly impacts the Court's decision to reject the doctrine of collateral estoppel. On several prior occasions, allegations of anticompetitive activities of defendant CEI and others have been raised in various proceedings before administrative agencies of the United States, in particular, the Federal Power Commission, the Atomic Energy Commission, and the Nuclear Regulatory Commission (NRC), none of which is possessed of jurisdiction to entertain claims under the Sherman Act and to afford the parties thereto a statutory remedy for violations of the Act. The contention that the opinions of one of those administrative agencies should bear some *res judicata*/collateral estoppel effect upon these proceedings logically argues for the same

determination with respect to the opinions of all of those administrative agencies.

The resolution of the issues presented to the FPC and the NRC has resulted in a spate of indecisive rulings and conflicting opinions. This Court cannot defer a full and fair presentation of the evidence to the discordant and inconsistent findings of the FPC and the NRC. To invoke the doctrine of collateral estoppel by adopting the conflicting administrative decisions and the antithetical findings of fact of the FPC and the NRC would blanket these proceedings with an impenetrable stygian fog of confusion and doubt. This Court shall not become a party to this administrative chaos.

Memorandum and Order, February 15, 1978, at p. 5.

The pronouncements of the foregoing mandate were subsequently reaffirmed by this Court in its Order of February 17, 1978. There, the Court refused to stay its hand pending completion of the NRC licensing proceedings, writing in material part:

In support of the proposed continuance, plaintiff asserts the doctrine of primary jurisdiction and further offers the final decision of the NRC, whenever it may issue, as conclusive of the issues joined herein. The requested continuance would be warranted only if this Court were to find the final decision of the NRC relevant to the proceedings before this Court by applying the doctrine of collateral estoppel. However, as previously stated in its order of February 15, 1978, the Court may not invoke the doctrine of collateral estoppel with respect to the rulings of either the Federal Power Commission (FPC) or the NRC.

As the Court has concluded, the conflicting and inconsistent decisions of the FPC and the NRC shall not provide the rule of order by which these proceedings shall be conducted.

* * * * *

The NRC, and its subsidiary boards, are neither interpretors nor guardians of the antitrust laws of this nation. Although the NRC may have developed a particular expertise in matters involving the nuclear generation of electrical power, this narrow field of experience does not extend to that administrative agency any unique insight into the intricate legal interpretations and applications of the Sherman and Clayton Acts or bespeak an expertise in antitrust law. Section 2135(c) of Title 42, United States Code, does not cloak the NRC with the mantle of judicial wisdom and experience, and statutory authority, through which the United States district and appellate courts have shaped and guided this nation's antitrust law for nearly a century. In accordance with the foregoing conclusions, the Court reiterates its rejection of the doctrine of collateral estoppel and adopts herein its pronouncements of law announced in the Order of February 15, 1978.

Order, February 17, 1978, pp. 3-6 (footnotes omitted).

This Court was presented with a third opportunity to assess the propriety of assigning estoppel effect to the foregoing administrative determinations by the Motion in Limine of defendant Toledo Edison Company. Consistent with the principles articulated in the aforementioned Orders, this Court once again declined to afford binding effect or otherwise defer to the administrative findings and determinations of the NRC or the FPC. Indeed the

Court, by Memorandum and Order issued August 10, 1979, entered an Order in Limine which, in clear and unequivocal language, instructed the litigants thusly:

> Accordingly, for the foregoing reasons, during the course of trial, no party shall, in the presence of the jury, allude to, refer to, or attempt to convey, either directly or indirectly, in any manner the findings, conclusions, determinations, or substance of any NRC or FPC administrative determination as such determination reflects upon the defendants' acts alleged herein to be in violation of Sections 1 or 2 of the Sherman Act.

Memorandum and Order, August 10, 1979, at p. 5.

This Court regards its previous mandates of February 15, 1978, February 17, 1978, and August 10, 1979, which are incorporated herein and made a part hereto, as dispositive of the issues joined by the motion at bar. The Court, having carefully reviewed the instant record, is not persuaded that a departure from its prior decrees is currently warranted. Indeed, the Court would observe, as discussed more fully below, that events transpiring subsequent to the issuance of the aforesaid Orders would appear to both confirm the soundness of this Court's previous resolutions and demonstrate further the impropriety, if not the infeasibility, of applying collateral estoppel principles herein to the administrative findings of the NRC.

Among the established prerequisites to the application of the collateral estoppel doctrine is the requirement that the determination in the prior proceeding be necessary and essential to the resulting judgment. 1B J. Moore, Federal Practice ¶0.443[5] (2d ed. 1974). *See Restatement (Second) of Judgments* §68, Comment h (tent. draft No.

4, 1977); *Parklane Hosiery Company, Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 649 n. 5 (1979). As stated by the Sixth Circuit Court of Appeals in *United States v. School District of Ferndale,* 577 F.2d 1339, 1349 (6th Cir. 1978):

> It is basic to the law of collateral estoppel that a finding in one proceeding cannot bind tribunals in subsequent cases unless the finding acted as a basis for final judgment in the first.

In applying this fundamental principle, the Court is constrained to conclude that it is currently impossible to ascertain with any appreciable degree of accuracy and reliability the specific factual determinations which in actuality underlie the decision of the NRC's Atomic Safety & Licensing Appeal Board ("Appeal Board"). The Court would observe initially that precise identification of those findings necessary to the Appeal Board's resolution would appear precluded by the rather irregular manner in which the three member Appeal Panel arrived at and issued its decision of September 6, 1979, and the uncertainties created thereby. A review of said decision[1] discloses that the member of the Appeal Board assigned the responsibility of drafting the panel's opinion, Jerome E. Sharfman ("Sharfman"), resigned from the NRC shortly after completing the opinion but before the same could be fully reviewed by the two remaining members of the panel. To avoid the appearance of impropriety, the remaining members of the Appeal Panel felt obliged to refrain from consulting with Sharfman at any time subsequent to his departure. The ramifications ensuing from this somewhat irregular procedure were described by the nondeparting members of the panel at the very outset of Appeal Board Decision:

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1. The decision of the Appeal Board is before the Court pursuant to the plaintiff's Motion for Leave to Lodge, filed October 26, 1979, which the Court hereby grants.

> Shortly after completing his opinion, however, our colleague resigned from the Appeal Panel to enter private law practice in another city. It was impossible for us to complete our own review of Mr. Sharfman's lengthy decision before his departure. And since that time, considerations of avoiding even the appearance of a conflict of interest situation have served to preclude our discussing with him any aspect of this proceeding.
>
> Had Mr. Sharfman remained a member of this Board, or continued to be available for consultation, *we might well have suggested revisions in his treatment of certain issues and have endeavored in other respects to persuade him of the correctness of our views* (particularly on the question of relief) to the extent that they do not coincide with his. Those options have not been open to us. In the circumstances, we file his opinion as it was presented to us (pp. 65*ff.*, *infra.*). We concur in its *ultimate* factual and legal conclusions and the result in it reaches except where indicated in our separate opinion, which follows immediately.

NRC Appeal Board Decision at p. 3, (emphasis supplied). The panelists' lack of unanimity with respect to certain unspecified issues was further reflected in a later passage from the separate opinion of the two remaining Appeal Board members:

> The remaining issues raised on appeal meriting extended discussion are covered in Mr. Sharfman's comprehensive and copiously annotated opinion (which begins at p. 65, *infra*). As we mentioned earlier, *had circumstances not intervened we might have suggested revisions in his treatment of certain of them.* Perusal of his opinion persuades us, however, that

> our former colleague's disposition of *most of the issues* is sound and little would be gained by adding our separate analyses to his lengthy discourse. We therefore join in his *ultimate* factual and legal conclusions except those dealing with relief. We disagree with some of these and we turn to them now.

Id. at p. 41 (emphasis supplied).

It is apparent from the foregoing that a numerical majority of the Appeal Board expressly limited their concurrence with Sharfman's lengthy and detailed opinion, wherein a preponderance of the Board's determinations are contained, to the "ultimate factual and legal conclusions" expressed therein. Significantly, the majority specifically disavowed concurrence with an undisclosed number of Sharfman's factual and legal resolutions, advising in fact that, had the opportunity been presented, certain unspecified revisions in the departing member's opinion would have been suggested.

Given the failure of a majority of the Appeal Panel to embrace without reservation the legal and factual conclusions contained in Sharfman's opinion, or to delineate with some precision the specific determinations found objectionable or acceptable, it cannot reasonably be denied that serious ambiguity exists with respect to the actual findings underlying the Appeal Board's decision.[2] It is equally apparent that collateral estoppel cannot properly obtain where, as here, the underlying decision in the prior proceeding is entirely ambiguous as to the factual findings necessary to support it. *See United States v. School Dis-*

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2. As defendants CEI and Duquesne Light have argued, it is virtually "impossible to know not only what facts were necessary to the decision of the Appeal Board, but, more basically, what facts the Appeal Board actually found." Joint Memorandum in Opposition to City's Motion in Limine, at pp. 11-12.

trict of Ferndale, supra at 1349-50. In view of the manifest ambiguities permeating the resolution of the Appeal Board, as described above, the Court is constrained to emphasize once again its unwillingness to "become a party to this administrative chaos."

The Court would observe additionally that identification of those factual determinations necessary and essential to the NRC's decision appears foreclosed at present by the absence of any final agency action. A review of the instant record discloses, for example, that each of the defendants involved in the NRC licensing proceeding have petitioned the full Commission for review of the Appeal Board's decision. In the event the Commission elects to undertake such review, it would appear under the NRC's Rules of Practice, 10 C.F.R. §§2.1 *et seq.*, that the Commission is fully authorized to review the Appeal Board's decision with respect to matters of law and policy. 10 C.F.R. §2.786(b)(4)(i). While the full Commission is not, as plaintiff correctly asserts, empowered to disturb those factual determinations initially resolved by the Atomic Safety & Licensing Board and affirmed thereafter by the Appeal Board, 10 C.F.R. §2.786(b)(4)(iv), the Commission may, pursuant to its authority to reconsider questions of law and policy, materially alter the Appeal Panel's decision. Should significant modifications in the Appeal Board's resolution ensue as a result of the full Commission's review, any collateral estoppel treatment to be afforded the NRC's subsidiary boards' factual findings would correspondingly be altered by application of the aforementioned principle that only findings necessary to the prior judgment may be given subsequent estoppel effect.

In view of the pendency of the aforesaid petitions for further administrative review, the Court at this junc-

ture can only speculate as the substance of the NRC's final decision and the factual determinations which may ultimately prove necessary to that decision. Even assuming then that the more fundamental objections to the invocation of collateral estoppel principles enumerated in this Court's above-cited Orders could be overcome, an assumption, incidentally, this Court regards as entirely without foundation, the Court would nonetheless be constrained under the present circumstances to join and apply herein the prevailing view that administrative findings cannot be afforded estoppel effect absent final agency action. *See Coca-Cola Company v. Federal Trade Commission,* 475 F.2d 299, 304 (5th Cir.), *cert. denied,* 414 U.S. 877, 94 S.Ct. 121 (1973); *Continental Can Company, U.S.A. v. Marshall,* 603 F.2d 590, 594-96 (7th Cir. 1979); *United Telephone Company of Pennsylvania v. Federal Communications Commission,* 375 F. Supp. 992, 997 n.3 (M.D. Pa. 1974); *cf. Cunegin v. Zayre Department Store,* 437 F. Supp. 100, 103 (E.D. Wis. 1977). In addition to its more fundamental shortcomings[3] then, plaintiff's motion would appear to be premature at this time.

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3. A review of this Court's prior Orders discloses that its failure to invoke collateral estoppel principles has been predicated in significant part on the recognition that the statutory mandates of the foregoing administrative forums differ substantially and materially from that of a tribunal presiding over a civil antitrust action. *See Tipler v. E. I. du Pont de Nemours and Co.,* 443 F.2d 125, 128-29 (6th Cir. 1971). It would appear from the recent decision of *In the Matter of Houston Lighting and Power Co.,* (South Texas Project, Units 1 and 2), Docket Nos. 50-498A, 50-499A, (October 9, 1979), that a NRC licensing board is in complete agreement. There, the licensing board refused to be bound by the antitrust findings of a United States District Court, reasoning in pertinent part:

> [C]onsideration must be given to the comparability of the issues involved in the two proceedings when the application of *res judicata* or collateral estoppel is invoked. Issues are not identical if the second action involves the application of a different legal standard, even though the factual setting of

(Continued on following page)

The Court would observe lastly that the Supreme Court's recent decision in *Parklane Hosiery Company, Inc., supra,* lends substantial support to this tribunal's consistent refusal to apply collateral estoppel principles to the foregoing administrative determinations. In *Parklane,* the Supreme Court expressly affirmed the discretion of the trial court to determine when the principles of collateral estoppel should properly obtain. The Court reasoned that "broad discretion" was appropriately conferred upon the district courts in order to safeguard litigants against potentially inequitable applications of the collateral estoppel doctrine. *Id.,* 99 S.Ct. at 651. Of particular significance to the instant controversy, the Court expressly intimated that a defendant would be unjustly burdened by invocation of estoppel principles in the instance where "the judgment

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Footnote continued—

> both proceedings may be the same. Thus the same historical facts may be involved in two actions, but the legal significance of the facts may differ because different legal standards are applicable to them. . . .
>
> The instant proceeding involves a finding under §105c(5) whether the activities under the license would create or maintain a situation inconsistent with the specified antitrust laws (42 U.S.C. §2135(c)). Such an inquiry covers a broad range of activities considerably beyond the scope of the "violation" standard of Section 1 of the Sherman Act. It is well established that in a Section 105c proceeding, it is not necessary to show an actual violation of the antitrust laws. . . .
>
> [T]here are substantial differences between the standards and issues involved in the Sherman Act, Section 1 suit based on restraint of trade by concerted action as alleged in the District Court litigation, when contrasted with the issues involved in this proceeding arising from allegations of monopolization (Sherman Act, Section 2), unfair methods of competition (FTC Act, Section 5), and inconsistency with underlying policies of antitrust laws (Section 105c). Where, as here, the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in the litigation of similar issues under a different statute.

In the Matter of Houston Lighting and Power Co., supra at pp. 8-10. (footnotes omitted)

relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.*

This Court has emphasized in its previous Orders the inconsistent and indeed antithetical findings of the FPC and the NRC. *See* in particular Memorandum and Order, February 17, 1978, at pp. 3-4, n.1. In view of these discordant administrative determinations, and in accordance with the equitable considerations of *Parklane, supra, see Starker v. United States,* 602 F.2d 1341, 1348-49 (9th Cir. 1979), the Court can only conclude that the principles of collateral estoppel cannot be extended to either the NRC or the FPC administrative determinations consistent with elementary principles of fairness and justice.

For all the reasons stated hereinabove, the Court finds the plaintiff's Motion for an Order in Limine without merit and properly denied.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX

[Appendix to Order Published at 538 F. Supp. 1227]

Civil Action No. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff

v.

THE CLEVELAND ELECTRIC ILLUMINATING CO.,
et al.,
Defendants

MEMORANDUM AND ORDER

(Filed February 15, 1978)

KRUPANSKY, *J.*

Defendant Cleveland Electric Illuminating Co. (CEI) has filed a Motion for Partial Summary Judgment and for an Order In Limine seeking to bind this Court to a ruling of the Federal Power Commission (FPC), pursuant to the doctrines of *res judicata* and collateral estoppel. Plaintiff responded in opposition and furthermore sought leave to lodge an FPC Opinion with the Court to assist in its determination of defendant's Motion for Partial Summary Judgment. Defendant CEI filed a response thereto asserting that it had no objection to the filing of said FPC Opinion. Accordingly, the Motion for Leave to Lodge FPC Opinion is hereby granted.

The doctrine of *res judicata* is succinctly stated at 46 Am. Jur. 2d *Judgments* §394 at 558-559 (1969):

> [T]he doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. (footnotes omitted).

See, Cromwell v. County of Sac, 94 U.S. 951 (1877); *Rogoski v. City of Muskegon,* 550 F.2d 1075 (6th Cir. 1977); *Brachett v. Universal Life Insurance Company,* 519 F.2d 1073 (5th Cir. [2] 1975); *Pan American Match, Inc. v. Sears, Roebuck and Co.,* 454 F.2d 871 (1st Cir.), *cert. denied,* 409 U.S. 892 (1972); *Harrison v. Bloomfield Building Industries, Inc.,* 435 F.2d 1192 (6th Cir. 1970); *Flynn v. State Board of Chiropractic Examiners,* 418 F.2d 668 (9th Cir. 1969); *Saylor v. Lindsley,* 391 F.2d 965 (2d Cir. 1968); *see also, Hart v. Federal Reserve Bank of Atlanta,* 270 F. Supp. 296 (E.D. Tenn. 1966), *aff'd,* 379 F.2d 961 (6th Cir. 1967), *cert. denied* 390 U.S. 924 1968).

The doctrine is, moreover, extended to include within its scope those issues which could have been, but were not, actually raised and decided in the first action. *Rogoski v. City of Muskegon, supra; Brachett v. Universal Life Insurance Company, supra; Flynn v. State Board of Chiropractic Examiners, supra; Saylor v. Lindsley, supra.*

Collateral estoppel, an offshoot of the doctrine of *res judicata,* is defined at 1B Moores Federal Practice ¶ 0.441[2] at 3777:

> The essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially

> and finally determined by a court of competent jurisdiction between the same parties or their privies. Thus the principle of such an estoppel may be stated as follows: Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended. (footnotes omitted)

Where *res judicata* requires identity of causes of action, collateral estoppel requires identity of factual issues. Where *res judicata* renders the earlier final adjudication conclusive of all such subsequent litigation, collateral estoppel renders conclusive only those issues of fact necessarily litigated. *Tipler v. E.I. duPont de Nemours and Co.*, 443 F.2d 125 (6th Cir. 1971).

[3] The doctrines of *res judicata* and collateral estoppel speak in terms of "judicial determinations by a court of competent jurisdiction." While it is certain beyond peradventure that the Federal Power Commission is not a judicial tribunal of jurisdiction concurrent with a United States District Court, under certain circumstances, the final decisions of administrative agencies may be given a *res judicata* or collateral estoppel effect. *See* e.g., *United States v. Utah Construction Co.*, 384 U.S. 934 (1966), *E.I. duPont de Nemours and Co., supra.* The doctrines are nonetheless applied more selectively when an administrative finding is involved. *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969); *United States v. School District of Ferndale*, Case No. 75-70958 (E.D. Mich. July 25, 1977). As stated in *Grose v. Cohen, supra* at 824-825:

> *Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. See Farley v. Gardner, 276 F. Supp. 270, 272 (S.D. W.Va. 1967). Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, e.g., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263 (1940); but practical reasons may exist for refusing to apply it, e.g., United States v. Stone & Downer Co., 274 U.S. 225, 47 S.Ct. 616, 71 L.Ed. 1013 (1927). And in any event, when traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, §18.03 (1958).

The Sixth Circuit Court of Appeals has furthermore recognized that

> neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. Title v. Immigration and Naturalization Service, 322 F.2d 21 (9th Cir. 1953); Matias Rivera v. Gardner, 286 F. Supp. 305 (D.P.R. 1968); Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local Union No. 584, 281 F. Supp. 971 (E.D.N.Y. 1968); 1B Moore's Federal Practice ¶ 0.405[12], at 791; 2 K. Davis, Administrative Law Treatise §18.02, at 548 (1958).

[4] *Tipler v. E.I. duPont de Nemours and Co., supra* at 128.

The opinion of the FPC which is at issue here was rendered within the context of a proceeding under Section 202(b) of the Federal Power Act, 16 U.S.C. §824(a), for an order requiring CEI to establish an electrical inter-

connection with the City of Cleveland. Although alleged anticompetitive practices by CEI were ultimately raised by the City in that proceeding, the underlying cause of action was not founded upon Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, as is the present controversy. The failure of identity of causes of action precludes resort to the doctrine of *res judicata*. Furthermore, pursuant to Section 15 of the Clayton Act, 15 U.S.C. §15, Congress vested the District Courts with exclusive jurisdiction to adjudicate claimed violations of the antitrust laws, and the doctrine of *res judicata* is particularly inappropriate where the first forum lacks the ability to afford the relief sought in the second forum. *Cream Top Creamery v. Dean Milk Company, Inc.*, 383 F.2d 358 (6th Cir. 1967).

The Court also observes that

> absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute. *See* Title v. Immigration and Naturalization Service, 322 F.2d 21, 25 n. 11 (9th Cir. 1963); 2 K. Davis, Administrative Law Treatise §18.04, at 577-78 (1958); *cf.* Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 601-602, 68 S.Ct. 715, 92 L.Ed. 898 (1948). This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary.

Tipler v. E.I. duPont de Nemours and Co., supra at 128-129. Admittedly, in ruling upon matters involving the interconnection and coordination of electrical generating facilities the FPC may consider allegations of anticompetitive practices. Nevertheless, the decision of the FPC was premised upon statutory authority wholly different from that which places the issue before this Court. Furthermore,

within the context of the FPC [5] proceedings, a determination that defendant CEI had in fact engaged in anticompetitive practices was not an immutable prerequisite to the granting of the requested relief. In consequence thereof, collateral estoppel is equally inappropriate in these antitrust proceedings.

One final consideration which merits review significantly impacts the Court's decision to reject the doctrine of collateral estoppel. On several prior occasions, allegations of anticompetitive activities of defendant CEI and others have been raised in various proceedings before administrative agencies of the United States, in particular, the Federal Power Commission, the Atomic Energy Commission, and the Nuclear Regulatory Commission (NRC), none of which is possessed of jurisdiction to entertain claims under the Sherman Act and to afford the parties thereto a statutory remedy for violations of the Act. The contention that the opinions of one of those administrative agencies should bear some *res judicata*/collateral estoppel effect upon these proceedings logically argues for the same determination with respect to the opinions of all of those administrative agencies.

The resolution of the issues presented to the FPC and the NRC has resulted in a spate of indecisive rulings and conflicting opinions. This Court cannot defer a full and fair presentation of the evidence to the discordant and inconsistent findings of the FPC and the NRC. To invoke the doctrine of collateral estoppel by adopting the conflicting administrative decisions and the antithetical findings of fact of the FPC and the NRC would blanket these proceedings with an impenetrable stygian fog of confusion and doubt. This Court shall not become a party to this administrative chaos.

Accordingly, defendant's Motion for Partial Summary Judgment and for an Order in Limine is hereby denied.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

CIVIL ACTION NO. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
Defendants

ORDER

(Filed February 17, 1978)

KRUPANSKY, *J.*

Before the Court is the February 7, 1977 Motion of Plaintiff to Stay Trial of this Action pending the final disposition of the proceedings before the Nuclear Regulatory Commission. The timing of this Motion, considered within the historical context of these proceedings, necessitates a review of the numerous forestalled attempts to bring this action to trial.

This action was initiated with the filing of a Complaint on July 1, 1975. In view of the significance of the claims and allegations presented therein, the Court, in an effort to accommodate plaintiff's express desire for a speedy disposition, initially assigned a trial date of January 19, 1976. However, upon the urging of plaintiff that additional time was necessary to complete discovery and upon the representation that settlement negotiations were then underway,

the Court continued the trial date to March 1, 1976 and set aside the initial days of that proceeding for an evidentiary hearing on the City's Motion to Disqualify counsel for defendant Cleveland Electric Illuminating Company (CEI), the law firm of Squire, Sanders & Dempsey (SS&D). Upon the further assertion of the parties that the aforesaid settlement negotiations might prove fruitful with an additional extension of time, the Court [2] once again continued the trial date and hearing on the Motion to Disqualify to March 15, 1976.

At a March 12, 1976 hearing, the Court was again importuned by the City to continue the trial date in order to accommodate the settlement negotiations of the parties. Once again, the Court acceded to the prayer of the City and continued the scheduled trial date of March 15, 1978. The repeated delays and requests for continuances ultimately placed in doubt the portended success of these settlement negotiations, and when those negotiations terminated in failure, the Court scheduled the disqualification hearing for June 14, 1976 with the trial to follow immediately thereafter. That hearing proceeded on schedule and ultimately resulted in the Court's August 3, 1976 Order denying plaintiff's Motion to Disqualify. Plaintiff's interlocutory appeal of that Order necessitated a stay of further proceedings pending a resolution of the appeal by the Court of Appeals for the Sixth Circuit. The Order of August 3, 1976 was subsequently affirmed by the Court of Appeals on December 12, 1977.

With the disqualification matter resolved by the Court of Appeals, the case is once again in a posture to be tried, albeit more than 2 1/2 years after the City elected to initiate these proceedings. A trial date of March 13, 1978 has been scheduled pending the issuance of the mandate of the Court of Appeals on the disqualification appeal.

The City, however, would further delay these proceedings in its endeavor to obtain another continuance of the scheduled trial date to a future indefinite date, ostensibly to accommodate final disposition of proceedings before the Nuclear Regulatory Commission (NRC) (successor to the Atomic Energy Commission) initiated by the petitions of the Toledo Edison Company and The Cleveland Electric Illuminating Company for licenses to [3] operate the Davis-Besse and Perry Nuclear Power Stations. Those proceedings before the NRC, which have continued for the past eight years and admit of no imminent conclusion, shall not serve to further delay the trial of this action.

In support of the proposed continuance, plaintiff asserts the doctrine of primary jurisdiction and further offers the final decision of the NRC, whenever it may issue, as conclusive of the issues joined herein. The requested continuance would be warranted only if this Court were to find the final decision of the NRC relevant to the proceedings before this Court by applying the doctrine of collateral estoppel. However, as previously stated in its Order of February 15, 1978, the Court may not invoke the doctrine of collateral estoppel with respect to the rulings of either the Federal Power Commission (FPC) or the NRC.

As the Court has concluded, the conflicting and inconsistent decisions of the FPC and the NRC shall not provide the rule of order by which these proceedings shall be conducted.[1] [4] Furthermore, the NRC has not com-

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1. On July 12, 1972, the presiding examiner for the FPC entered his decision on the petition of the City of Cleveland for a permanent interconnection with CEI. That decision was later adopted by the FPC on January 11, 1973. At page 16 of the initial decision, the administrative law judge concluded:

> Finally, the City's allegations that its difficulties in maintaining service to its customers are due in whole or in part

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mended itself convincingly in proceedings ancillary to its review of the licensing petitions of CEI and the Toledo Edison Company (viz. in disqualification proceedings before the Atomic Energy Licensing Board, which were more remarkable for the manner in which they evolved than for the ultimate conclusion reached therein).[2] Notwith-

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Footnote continued—

> to CEI's anticompetitive practices are not supported by the record in this consolidated proceeding. This record indicates that the City's past inability to furnish reliable, dependable service on the MELP system to its own customers has been due primarily to incompetent management and inefficient operations . . .

A contrary conclusion was reached by the Atomic Safety and Licensing Board of the NRC in its initial decision of January 6, 1977 upon review of petitions for licenses to operate the Davis-Besse and Perry Nuclear Power Stations. The confusion raised by the elemental conflict of the decisions of the FPC and the NRC is more surprising in light of the NRC's failure to bind itself to the earlier determinations of the FPC under the doctrine of collateral estoppel. Plaintiff would, nevertheless, have this Court follow in the footsteps of the NRC.

Reviewing the opposing conclusions of the FPC and the NRC, this Court stated, at page 5 of its Order of February 15, 1978:

> The resolution of the issues presented to the FPC and the NRC has resulted in a spate of indecisive rulings and conflicting opinions. This Court cannot defer a full and fair presentation of the evidence to the discordant and inconsistent findings of the FPC and the NRC. To invoke the doctrine of collateral estoppel by adopting the conflicting administrative decisions and the antithetical findings of fact of the FPC and NRC would blanket these proceedings with an impenetrable stygian fog of confusion and doubt. This Court shall not become a party to this administrative chaos.

That determination also reflects the Court's position with respect to the instant Motion and is therefore adopted herein.

2. In the proceedings before the Atomic Energy Licensing Board of the NRC, the City of Cleveland filed a motion on November 20, 1975 seeking the disqualification of the law firm of Squire, Sanders & Dempsey (SS&D), counsel for CEI. After an evidentiary hearing, the Board granted the motion on January 20, 1976 and disqualified SS&D from further representation of CEI in proceedings before the NRC. Pursuant to the rules and regulations of the Commission, the matter was thereafter referred to

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standing [5] this history of administrative discord and indecision, plaintiff urges the Court to defer to the determinations of the NRC in these matters.

The NRC, and its subsidiary boards, are neither interpretors nor guardians of the antitrust laws of this nation. Although the NRC may have developed a particular expertise in matters involving the nuclear generation of electrical power, this narrow field of experience does not extend

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Footnote continued—

a Special Board for review of the disqualification proceedings. The Special Board issued its opinion on February 24, 1976 therein concluding that SS&D should *not* be disqualified. The Licensing Board subsequently determined that the opinion of the Special Board was advisory only, and, choosing not to follow that opinion, the Licensing Board again disqualified SS&D.

Undaunted by this double reverse, SS&D pressed an appeal to the Atomic Safety and Licensing Appeal Board. In its decision of June 11, 1976, the Appeal Board concluded that the Licensing Board had proceeded improperly in conducting disqualification proceedings in the first instance and remanded the matter to the Special Board for a formal evidentiary hearing. Shortly thereafter, on August 3, 1976, while the administrative carousel whirled merrily along, this Court, in disqualification proceedings simultaneously conducted in the within action, entered its Order denying the City's Motion to Disqualify SS&D. Decelerating to keep time with the music, the Special Board of the NRC granted on November 5, 1976, the motion of CEI to dismiss the disqualification proceedings in conformity with the Court's Order of August 3, 1976. The City, however, still out of tempo, appealed the decision of the Special Board to the Appeal Board. On March 1, 1977 the Appeal Board stopped the music altogether by affirming the decision of the Special Board, with the caveat that the chase could begin anew if the Court of Appeals for the Sixth Circuit reversed this Court's Order of August 3, 1976. The Court of Appeals affirmed the August 3, 1976 Order in its opinion dated December 12, 1977, and reaffirmed that position on January 24, 1978.

The matter is now, of course, a closed chapter in the NRC proceedings. In retrospect, however, this circuitous and debilitating administrative imbroglio resembles more a confusing misadventure than it does an orderly and efficient system of administrative justice imbued with sagacity and experience. The NRC disqualification proceedings demonstrated not only a misunderstanding of the substantive legal principles of conflict of interest, but further manifested a fundamental misinterpretation of the procedural rules and regulations by which administrative proceedings are to be conducted.

to that administrative agency any unique insight into the intricate legal interpretations and applications of the Sherman and Clayton Acts or bespeak an expertise in antitrust law.[3] Section 2135(c) of [6] Title 42, United States Code, does not cloak the NRC with the mantle of judicial wisdom and experience, and statutory authority, through which the United States district and appellate courts have shaped and guided this nation's antitrust law for nearly a century. In accordance with the foregoing conclusions, the Court reiterates its rejection of the doctrine of collateral estoppel and adopts herein its pronouncements of law announced in the Order of February 15, 1978.

In passing, the Court pauses to observe that recent public statements present the appearance of a calculated effort on behalf of the City to delay these proceedings, for purposes known only to itself. Early on in these proceedings, the Court admonished the parties to refrain from politicizing the Court's jurisdiction by projecting this tribunal as a forum for political debate or to manipulate or attempt to manipulate the Court's administration for

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3. The NRC's "Congressionally mandated antitrust review", advanced in plaintiff's motion, is authorized by the recent amendments to the Atomic Energy Act, 42 U.S.C. §2135(c) (amended December 19, 1970), Pub. L. No. 91-560, 84 Stat. 1473, which directs the Commission to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection (a) of this Section." 42 U.S.C. §2135(c)(5). This finding, which is the sole manifestation of the NRC's authority to review alleged anticompetitive activities of prospective licensees, is dependent in large part upon the advice of the Attorney General regarding the existence of any adverse antitrust aspects of a proposed license. 42 U.S.C. §2135(c)(5). It may also be observed that the wording of this particular statutory provision is deliberately ambiguous, (e.g. "adverse antitrust aspects", "a situation inconsistent with the antitrust laws"), and affords the NRC no authority to determine the existence of any direct violations of the Sherman and Clayton Acts. That determination rests within the statutory jurisdiction of the United States District Court. 15 U.S.C. §§4 and 15.

partisan political purposes. Accordingly, through oversight or otherwise, the Court's admonition should not go unheeded and the parties should be ever mindful of the present posture of this case as pending before a United States District Court and meticulously avoid conduct which may be even remotely construed as inconsistent with 18 U.S.C. §§401 and 402.

Accordingly, the Motion to Stay Trial is hereby denied and the trial of this action shall proceed as scheduled unless and until any action by the Supreme Court of the United States, or the Court of Appeals for the Sixth Circuit, on plaintiff's [7] proposed petition for certiorari on the disqualification issue warrants a further extension of the trial.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

Civil Action No. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
Defendants

MEMORANDUM AND ORDER

(Filed August 10, 1979)

KRUPANSKY, *J.*

This matter is now before the Court on the Motion in Limine of Toledo Edison Company (Toledo Edison) and the joint Motion in Limine of Ohio Edison Company and Pennsylvania Power Company (collectively Ohio Edison), whereby said defendants seek preliminary rulings on anticipated evidentiary questions which may arise during trial.

In its Motion, Toledo Edison petitions the Court to foreclose the City from disclosing to the jury either directly or indirectly:

(1) The existence or pendency of proceedings before the Nuclear Regulatory Commission which have or may affect any of the parties to this action,

and any opinions or conclusions of the Nuclear Regulatory Commission which have or may hereafter be rendered as a result of the aforementioned proceedings before the Nuclear Regulatory Commission; and

(2) Any alleged activities of the Toledo Edison Company in relation to:

(a) the cities of Bowling Green, Bryan, Napoleon and Waterville;

(b) wheeling or failure to wheel power in Northwestern Ohio;

(c) power supply agreements in Northwestern Ohio;

[2] (d) territorial agreements in Northwestern Ohio;

(e) agreements with the Buckeye Power Company;

(f) refusal to engage in joint ownership of large-scale generating facilities with electric utility companies in Northwestern Ohio;

(g) acquisitions of or mergers with other electric utility companies in Northwestern Ohio;

except insofar as any of the above items may (refer or relate directly to plaintiff City of Cleveland, application by any person for membership or unit power purchase participation in CAPCO or discussion by any defendant in relation thereto, or application by any person for ownership in any nuclear facility or portion thereof or discussion by any defendant in relation thereto.[1]

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1. Motion in Limine of Toledo Edison.

Ohio Edison seeks a similar prohibition against the City to avoid alluding to:

> (1) any aspect of any relationship between any . . . defendant [other than CEI] and any municipal electric utility, rural electric cooperative, or association of municipal utilities or rural electric cooperatives located in the geographical area served by said . . . defendant; and
>
> (2) any alleged territorial agreement between any defendant and another investor-owned utility. (footnote omitted)[2]

This is not the first occasion the issues joined by the present Motions have been before the Court. With respect to Nuclear Regulatory Commission (NRC) proceedings in which certain of the present parties appeared, in an Order dated February 17, 1978 the Court denied the City's Motion to stay the trial of this action pending the final disposition of the proceedings before the NRC.[3] In doing so, the Court stated:

> **[3]** The NRC, and its subsidiary boards, are neither interpreters nor guardians of the antitrust laws of this nation. Although the NRC may have developed a particular expertise in matters involving the nuclear generation of electrical power, this narrow field of experience does not extend to that administrative agency any unique insight into the intricate legal interpretations and applications of the Sherman and Clayton Acts or bespeak an expertise in antitrust law.

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2. Motion in Limine of Ohio Edison.

3. The City's appeal from the denial of that Motion was dismissed, as a non-final order, by the Sixth Circuit Court of Appeals. *City of Cleveland v. Cleveland Electric Illuminating Co.*, No. 78-3223 (6th Cir. Aug. 4, 1978).

> Section 2135(c) of Title 42, United States Code, does not cloak the NRC with the mantle of judicial wisdom and experience, and statutory authority, through which the United States district and appellate courts have shaped and guided this nations antitrust law for nearly a century. *Memorandum and Order*, February 17, 1978, at 4-5 (footnote omitted).

For substantially similar reasons, the Court rejected CEI's attempt to commit the Court to a ruling of the Federal Power Commission (FPC). *See Memorandum and Order*, February 15, 1978. The Court of Appeals for the District of Columbia has consistently held that regulatory agencies have neither a duty to administer the antitrust laws nor jurisdiction to determine violations thereof. *See Alabama Power Co. v. Federal Power Commission*, 511 F.2d 383, 393 (D.C. Cir. 1974); *Cities of Statesville v. Atomic Energy Commission*, 441 F.2d 962, 986-87 (D.C. Cir. 1969) (Leventhal, J., concurring); *Northern Natural Gas Co. v. Federal Power Commission*, 399 F.2d 953, 960 (D.C. Cir. 1968). Thus, in *Northern Natural Gas Co. v. Federal Power Commission*, *id.* at 960-61, the court, after review of the relationship between antitrust law and the duties of federal regulatory agencies, concluded:

> This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust laws. *See* People of State of California v. F.P.C., *supra*, 369 U.S. at 490, 82 S.Ct. 901; United States v. Radio Corporation of America, *supra*, 358 U.S. at 350 n. 18, 79 S.Ct. 457; National Broadcasting Co. v. United States, 319 U.S. 190, 223-224, 73 S.Ct. 998 (1943); Mansfield Journal Co. v. F.C.C., 86 U.S. App. DC 102, 107, 180 F.2d 28, 33 (1950). Nor are the agencies strictly bound by the dictates of those laws, for they can and do approve actions which violate

antitrust policies where [4] other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" F.M.C. v. Aktiebolaget Svenska Amerika Linien, *supra*, 390 U.S. at 244, 88 S.Ct. at 1009. (footnote omitted)

Contrary to the arguments of the City, the statutory authority and responsibility of the NRC is related solely to prelicensing anticompetitive review and is severely proscribed to considerations of efformation and perpetuation of reasonably probable anticompetitive practices foreseeably arising from future activities under the license. *See* 42 U.S.C. §2135(c)(5).[4] The NRC is permitted to undertake this finite prospective review under what the Supreme Court has consistently referred to as the "public interest standard" of federal regulatory commissions. *See, for ex-*

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4. The comments of the Joint Committee on Atomic Energy on the 1970 amendment of 42 U.S.C. §2135 are instructive in this regard.

> The concept of certainty of contravention of the antitrust laws or policies clearly underlying these laws is not intended to be implicit in this standard . . . . It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.
>
> * * *
>
> With respect to the above finding, although the words "reasonable probability" do not appear in the standard, the concept of reasonable probability is intended to be a silent partner to the factors in the standard. The standard must be considered in the focus of reasonable probability - not certainty or possibility.

H. R. Rep. No. 91-1470, 91st Cong., 2d Sess., *reprinted in* 1970 U. S. Code Cong. & Ad. News 4981, 4994, 5011.

ample, Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973); *California v. Federal Power Commission,* 369 U.S. 482, 484 (1962); *United States v. Radio Corporation of America,* 358 U.S. 334, 351 (1959). The [5] NRC's refinement of the public interest standard is set forth in 42 U.S.C. §2135(c)(6) and reads:

> In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest.

Addressing the effect of a regulatory agency determination under a substantially similar public interest statute, the Supreme Court held that approval by the Federal Communications Commission (FCC) of an exchange of radio stations would have no estoppel effect on a subsequent antitrust action because "the issue in controversy before the [FCC] was whether the exchange would serve the public interest, not whether §1 of the Sherman Act had been violated." *United States v. Radio Corporation of America, supra,* 358 U.S. at 468.

Accordingly, for the foregoing reasons, during the course of trial, no party shall, in the presence of the jury, allude to, refer to, or attempt to convey, either directly or indirectly, in any manner the findings, conclusions, determinations, or substance of any NRC or FPC administrative determination as such determination reflects upon the defendants' acts alleged herein to be in violation of Sections 1 or 2 of the Sherman Act. The Court is mindful, however, that occasions may arise during trial when a party deems it necessary to discuss, or to

elicit testimony concerning, proceedings before the NRC or the FPC. In those instances, counsel shall request a determination by the Court as to the propriety and necessity thereof, which request shall be made outside the hearing of the jury.[5]

[6] The Court defers ruling upon the objections presented by Ohio Edison's Motion in Limine and the second branch of Toledo Edison's Motion in Limine, both of which are directed to a common issue, i.e., exclusion of evidence concerning alleged territorial agreements with other investor owned utilities and/or evidence of existing practices between the respective companies and municipally owned utilities and electrical cooperatives within their respective service areas to a point during trial when such objections may be considered within the context of all of the evidence developed to that juncture of the proceeding.

Toledo Edison's Motion in Limine is hereby granted in part and denied in part as premature, and Ohio Edison's Motion in Limine is hereby denied as premature.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

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5. This Court's Order of February 6, 1978, which held that depositions taken in the NRC proceeding may be used in the same manner and to the same extent as if they had been taken in this action, presents no insurmountable problems. If counsel for the City finds it necessary to refer to the NRC proceeding in laying a proper foundation for the use of such a deposition, a side bar conference will be appropriate.

APPENDIX D

Joint Stipulations of Fact

(Filed September 6, 1980)

Civil Action No. C75-560

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff,
v.
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendant.

JOINT STIPULATIONS OF FACT

In accordance with the Court's pre-trial Order, the following represent Stipulations of Fact to which the parties have agreed.

For the purposes of this action only, Plaintiff, The City of Cleveland ("City") and Defendant, The Cleveland Electric Illuminating Company ("CEI") stipulate to the following. By so stipulating, neither the City nor CEI concedes the relevance or competence of any stipulated fact.

* * * * *

227. On February 24, 1972, CEI caused a Cleveland law firm (the "Law Firm") to telephone Charles Miller,

Esq. ("Miller"), a Cleveland attorney, to request that Miller attend a meeting at the Law Firm that day. Miller went to the Law Firm and was introduced to Lee C. Howley, Esq. ("Howley") who was at that time General Counsel for CEI.

228. On March 8, 1972 the Federal Power Commission issued an order directing that there be an immediate emergency interconnection between CEI and Muny Light.

229. Between February 24, 1972 and May 9, 1972, Miller conferred five times, either by telephone or in person, with Howley and/or Donald H. Hauser, Esq. ("Hauser") then the CEI Corporate Solicitor and now its General Attorney. During these conferences Howley and Hauser gave Miller advice and technical information concerning the proposed taxpayer suit.

230. On April 11, 1972, Howley and Hauser prepared a letter (signed by Howley as Vice President and General Counsel of CEI) to the Director of the City Law Department stating, among other things, that the City, CEI and the Federal Power Commission staff have all agreed that there should be an interconnection and reiterating that CEI will be happy to work with the City concerning the interconnection. (PTX-2694)

231. On May 9, 1972, Miller filed a taxpayer action against the City of Cleveland (Case No. 905,940 in the Court of Common Pleas of Cuyahoga County, Ohio) praying for a temporary restraining order and injunction against the construction and installation of the temporary emergency interconnection. Subsequently, on May 11, 1972, the Court issued a temporary restraining order (to be in effect for six days) enjoining the payment of any money on account of the work on the temporary interconnection then going forward but declining to restrain the work. Miller immediately reported this to Howley by telephone.

232. On May 12, 1972, Hauser wrote to the Director of the City Law Department and the Commissioner of Muny Light enclosing a license agreement for the right-of-way for the temporary emergency interconnection and stating that the general route of the interconnection line was approved. (PTX-1552)

233. On May 12, May 16, May 17 and May 18, 1972, Miller conferred, in person or by telephone, with Hauser concerning the taxpayer suit. During these conversations Hauser recommended that Miller use the services of the electrical engineering firm of Bowshot, Cooper and O'Donnell, which firm had previously done work for CEI. At one of these meetings (May 17) Fred Sener of the CEI Engineering Department participated and provided technical information to Miller for use in the taxpayer lawsuit.

234. On May 18, 19 and 22, 1972, Miller conferred with representatives of Bowshot, Cooper and O'Donnell and did utilize Howard Cooper of that firm for expert testimony in court proceedings.

235. Hearings were had in the taxpayer action on May 22 and 23, 1972, and on May 23, 1972, the temporary restraining order was dissolved by the Court and plaintiff's motion for an injunction was denied and an entry made dismissing plaintiff's complaint. Thereafter on May 26, 1972 plaintiff filed a request with the court for findings of fact and conclusions of law.

236. On June 6 and June 14, 1972, Miller had telephone conversations with Hauser concerning the taxpayer action, including the subject of filing a notice of appeal in that action.

237. On June 21, 1972, Miller filed a notice of appeal in the taxpayer action.

238. On July 17, 1972, Hauser wrote to Miller with respect to an initial ruling of a Federal Power Commission hearing examiner noting that the examiner said nothing as to whether the interconnection line should be overhead or underground. (PTX-2695)

239. Thereafter on July 21, 1972, Judge Pryatel of the Court of Common Pleas made his findings of fact and conclusions of law and on the same day made a judgment entry vacating his previous judgment entry dismissing plaintiff's complaint and rendering final judgment for the defendant, and entered an order which denied plaintiff's request for a permanent injunction, ordered that the City prepare final plans and specifications for the construction of its temporary overhead transmission line, required the Collier Construction Company to perform its construction of said transmission line in conformity with the standards of the National Electric Safety Code and further ordered "that the defendant City of Cleveland, subject to any pertinent order of the Federal Power Commission, and as promptly as possible after issuance of such order, shall contract and install underground the permanent interconnection between the defendant the City of Cleveland's Municipal Electric Light Plant and the Cleveland Electric Illuminating Company's generating plant." Thereafter, plaintiff permitted his appeal previously filed to be dismissed for want of prosecution.

240. On July 26, 1972, Miller wrote to Hauser with respect to Findings of Fact and Conclusions of Law which the Court entered.

241. In August of 1972, Miller received payment from the Law Firm for his services and expenses in connection with the taxpayer suit, which payment was reimbursed by CEI.

* * * * *

APPENDIX E

Oral Order of the United States District Court

(September 19, 1980)

* * * * *

[1243] The Clerk: The City of Cleveland versus the Cleveland Electric Illuminating Company, C75-560.

The Court: Gentlemen, I have reviewed the presentations concerning the Noerr-Pennington doctrine, and also the Eastern Railroad Presidents Conference case together with progeny; and it appears that the doctrine itself was announced by the Supreme Court from whence it took its name, 365 U.S. 127, decided in 1961.

Justice Black stated on behalf of the Court:

"We accept as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.

"It has been recognized, at least since the landmark decision of this Court in Standard Oil Company of New Jersey v. United States, that the **[1244]** Sherman Act forbids only those trade restraints and monopolizations that are created or attempted by the acts of individuals or combinations of individuals or corporations.

"Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the act can be made out.

"These decisions rest upon the fact that under our form of government the question whether a law of that

kind should be passed, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of the government as long as the law itself does not violate some provision of the Constitution."

The Supreme Court premised its holding upon two precepts of law which touch the very foundations of freedom and democracy in our constitutional form of government.

First the Court propounded:

"In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability **[1245]** of the people to make their wishes known to their representatives.

"To hold that the Government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely form the government of their wishes, would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."

Describing the second premise as one "of at least equal significance," the Court went on to recognize that:

"The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

"Indeed, such an imputation would be particularly unjustified in this case in view of all of the countervailing considerations enumerated above."

In summary, the Court concluded:

"Insofar as that Act [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints,

not political activity, [1246] and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity."

Thereafter, in a later case, United Mineworkers versus Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965), the Supreme Court reaffirmed its pronouncement in Noerr Motor Freight and held that Sherman Act liability could not be premised upon attempts to influence the Secretary of Labor and Tennessee Valley Authority officials to modify their official policies.

The Court interpreting Noerr Motor Freight stated:

"In Eastern Railroad Presidents Conference versus Noerr Motor Freight, Inc., 365 U.S. 127, the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials.

"The Sherman Act, it was held, was not intended to bar concerted action of this kind, even though the resulting official action damaged other competitors at whom the campaign is aimed.

"Furthermore, the legality of the conduct [1247] was not at all affected by any anticompetitive purpose it may have had, even though the sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business.

"Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved."

The Court further explained that the Noerr-Pennington doctrine, "shields from the Sherman Act a concerted

effort to influence public officials regardless of intent or purpose."

Thus, the Noerr-Pennington doctrine, as enunciated in the two cases from which its name is derived exempts from sanction under the Sherman Act, activities directed toward influencing the passage or enforcement of laws, i.e. petitioning or otherwise lobbying the legislative branch of government for the passage of laws or pressuring the executive branch for their enforcement.

See California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508, 510, 92 Supreme Court 609, 611, 30 L.Ed. 2d 641 (1972).

In California Motor Transport, the United [1248] States Supreme Court again reaffirmed the Noerr-Pennington doctrine and extended its coverage to overtures made by private citizens or groups and directed at "administrative agencies (which are both creatures of the legislature and arms of the executive) and . . . courts, the third branch of government."

The Court went on to say:

"Certainly the right to petition extends to all departments of the government. The right of access to the courts is indeed but one aspect of the right of petition.

"We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of State and Federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."

See also Feminist Women's Health Center v. Mohammed, 586 Fed. 2d 530, 543 (Fifth Circuit 1978), cert. denied, 100 Supreme Court, 262 (1979).

The Court, however, went on to announce the "sham" exception to the Noerr-Pennington doctrine **[1249]** holding that where there emerges "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused," by an individual or group with the intent to "harass and deter their competitors from having free and unlimited access to the agencies and courts," a violation of the antitrust laws has been established.

As alluded to hereinabove, the Noerr-Pennington doctrine rests primarily upon two firmly established precepts of law.

Apparent from the Supreme Court's pronouncement in Noerr Motor Freight is the fact that the doctrine has First Amendment underpinnings; immunizing from antitrust liability the right of the people to engage in political activity and petition their government.

Secondly, the Noerr-Pennington doctrine has related to the equally well-established "state action" doctrine enunciated by the Supreme Court in Parker v. Brown, 317 U.S. 341, 63 Supreme Court, 307, 87 L.Ed. 315 (1943).

Indeed, in Noerr Motor Freight, the Court said:

[1250] "It has been recognized, at least since the landmark decision of this Court in Standard Oil Company of New Jersey v. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations."

"Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.

"These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government as long as the law itself does not violate some provision of the Constitution."

Although the Noerr-Pennington doctrine is not, strictly speaking, a rule of evidence, it does carry some evidentiary ramifications.

In United Mineworkers of America v. Pennington, 381, U.S. 657, 85 Supreme Court, 1585 (1965), the United States Supreme Court **[1251]** undertook to consider, however briefly, the evidentiary impact of its holdings in Noerr and Pennington.

In an off-cited footnote, the Court, through Justice White stated:

"It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis of a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

Construing this language, lower Federal Courts have consistently reiterated that the trial judge is vested with broad discretion in determining the admissibility of evidence of conduct falling within the protection of the Noerr-Pennington doctrine.

See, E. G. Lamb Enterprises, Inc. v. Toledo Blade Company, 461 Fed. 2d 506, 515 (Sixth Circuit, 1972),

cert. denied, 409 U.S. 1001 (1972), cert. denied, 409 U.S. 1001 (1972); **[1252]** Household Goods Carriers Bureau v. Terrell, 452 Fed. 2d 152, 158 (Fifth Circuit, 1971); Weit v. Continental Illinois National Bank & Trust Company of Chicago 467 Fed. Supp. 197, and a number of other District Court cases.

Moreover, those courts which have passed upon the issue have employed a balancing test to determine the admissibility of such evidence.

In Feminist Women's Health Center v. Mohammed, 586 Fed. 2d 530 (Fifth Circuit, 1978), cert. denied, 100 Supreme Court, 262 (1979), the Fifth Circuit Court of Appeals elaborated:

"Admissibility, we think, should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the Defendant's First Amendment rights."

The Court went on to hold that the probative value of the evidence is far outweighed by the defendant's First Amendment interest.

Within this context, the plaintiff has moved the Court to read to the jury Joint Stipulations 226 through 240. CEI has interposed an objection premised upon the **[1253]** Noerr-Pennington doctrine.

The Court notes that the motion presently before it arises under essentially the same fact situation encountered by the Supreme Court in Noerr; namely, that the act charged, in this case, the clandestinely undertaken litigation underwritten by CEI is evidence to be presented to the jury to demonstrate defendant's intent to eliminate competition between it and Muny Light.

As stated in Noerr at pages 140 and 141:

"The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroad's publicity campaign was the use in the campaign of the so-called third-party technique.

"The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business conduct on the part of the railroads.

"As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving 'deception of the public, manufacture of bogus sources of reference, and distortion of public sources of **[1254]** information,' depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups.

"We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations, is one which falls far short of the ethical standards generally approved in this country.

"Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity.

"The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena."

The Court went on to say:

"Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such **[1255]** legislation.

"All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

"Moreover, we think the courts below themselves recognized this fact to some extent, for their disposition of the case is inconsistent with the position that the use of the third-party technique alone could constitute a violation of the Sherman Act."

The Court went on to say, page 532:

"In addition to the foregoing factors, both of which relate to the intent and methods of the railroads in seeking governmental action, the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was 'more than merely an attempt to pass legislation. It was the purpose and intent to hurt the truckers in every way possible, even though they secured no legislation.'

"The District Court found that the purpose of the railroads was to destroy the goodwill of the **[1256]** truckers among the public generally and among the truckers' customers particularly in the hope that by doing so the overall competitive position of the truckers would be weakened and that the railroads were successful in these efforts to the extent that such injury was actually inflicted.

"The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above.

"But this effect is only apparent and cannot stand under close scrutiny."

The Court went on to say:

"The District Court's finding that the railroad's campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers, can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroad's campaign to influence governmental action, and that the railroads were hopeful that this might happen. Thus the issue presented by the lower courts conclusion of a violation of the Sherman Act on the basis of this injury is no different than the **[1257]** issue presented by the factors already discussed."

The Court went on to say:

"It is inevitable whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of and possibly even pleased by the prospect of such injury.

"To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns."

"We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act."

The Court went on to say:

"In this particular instance each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted **[1258]** in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be no consequence so far as the Sherman Act is concerned.

"That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law-enforcement."

The pronouncements of the Supreme Court in California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508, 92 Supreme Court, 609 (1972), do not, under the evidence adduced today, compel a departure from the foregoing principles of Noerr.

In the California Motor Transport litigation the Court stated at 512-513, 92 Supreme Court, at 613:

"Yet unethical conduct in the setting of the adjudicatory process often results in sanctions.

"Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in **[1259]** Walker Process Equipment, Inc. v. Food Machinery & Chemical Company, 382 U.S. 172.

"Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression.

"Similarly, bribery of a public purchasing agent may constitute a violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

"There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations.

"Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.

"Opponents before agencies or courts often think poorly of the other's tactics, motions or defenses, and may readily call them baseless.

"One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused."

[1260] This passage has been construed by four justices of the United States Supreme Court as suggesting that a single instance of abuse of the judicial process may be sufficient to invoke the "sham" exception to Noerr-Pennington, Vendo Company v. Lectro-Vend Corp., 433 U.S. 623, 661, 662, 97 Supreme Court, 2881, 2901-2093 (1977) (Stevens dissenting.)

While a majority of the Supreme Court has neither embraced nor rejected this view, there exists lower case authority which has held that a pattern of litigation is not essential to the applicability of the "sham" exception, Associated Radio Service Company v. Page Airways, Inc., 414 Fed. Supp. 1088, 1096 (N.D. Texas 1976); Tech-

nicon Medical Information Systems v. Greenbay Packaging, 480 Fed. Supp. 124, 127, 128 (E.D. Wisconsin, 1979).

It would appear, however, that the repetitious character of the litigation, or the lack thereof, remains a relevant although not dispositive factor. Colorado Petroleum Marketers Association v. Southland Corp., 476 Fed. Supp. 373, 378, 379 (D. Colorado, 1979). Accord; Mountain Grove Cemetery v. Norwalk Vault Company, 428 Fed. Supp. **[1261]** 951, 955 (D. Connecticut, 1977). See also Ernest W. Hahn, Inc. v. Codding.

Moreover, it has been stated that a single lawsuit which does not entail "unethical misconduct similar to abuses described in California Transport is not sufficient to bring the defendant's actions within the "sham" exception. First National Bank of Omaha v. Marquette National Bank, 482 Fed. Supp., 514, 522 (D. Minnesota, 1979). Accord; Mountain Grove Cemetery.

Applying these principles, the Court is of the opinion that the instant record, as presently comprised, does not evidence a corruption or abuse of the judicial process within the purview of California Motor Transport.

There is no suggestion, for example, that the litigation here in question entailed perjured testimony, the bribery of, or the conspiracy with, a public official, or any other aggravating circumstances akin to those enumerated and condemned in California Motor Transport.

The fact that CEI covertly sponsored and financed the taxpayer suit would appear of little consequence. As the case authorities have **[1262]** recognized, that activity of soliciting others to institute lawsuits constitutes expressive conduct protected by the First Amendment. Ernest W. Hahn, Inc. v. Codding, 423 Fed. Supp. 913, 918 (N.D. California, 1976). Reversed on other grounds, 615 Fed.

2d 830 (Ninth Circuit, 1980); See Wilmorite Inc. v. Eagan Real Estate, Inc., 454 Fed. Supp. 1124, 1133 (NDNY, 1977), affirmed without opinion, 578 Fed. 2d 1372, cert. denied, 439 U.S. 983, 99 Supreme Court, 573 (1978).

Moreover, Noerr itself, as previously indicated, clearly counsels that the employment of the third-party technique is insufficient to trigger the application of the sham exception.

Of equal significance, the litigation here in issue was neither repetitive nor baseless in nature.

Indeed, a review of Joint Stipulation 239 discloses that certain of the relief apparently sought in the taxpayers' suit, that concerning the installation of the permanent interconnection, was ultimately granted by the State Court.

This partial success of the taxpayers' suit clearly undermines any contention that this **[1263]** litigation carried the hallmark of unsubstantial claims. Otter Tail Power Company v. United States, 410 U.S. 366, 380, 93 Supreme Court, 1022, 1031 (1973). See also Ernest W. Hahn, Inc. v. Codding, 615 Fed. 2d 830, 841 (Ninth Circuit, 1980).

In view of the foregoing, including the fact that taxpayers' suit cannot be considered frivolous in nature, the Court is constrained to find that the sham exception to the Noerr-Pennington doctrine has not, at this juncture, been properly invoked.

The Court recognizes the established principle that evidence of activity protected under Noerr-Pennington may, in appropriate instances, be admitted for the limited purpose of showing "the purpose and character of the particular transactions under scrutiny." United Mine-

workers of America v. Pennington, 381 U.S. 657, 670, 85 Supreme Court, 1585, 1593 (1965).

Admission is proper, however, only where the probative value of the proof outweighs the prejudicial impact.

As stated by the Fifth Circuit Court of Appeals in Feminist Women's Health Center v. **[1264]** Mohammed, 586 Fed. 2d 530, 543 (Fifth Circuit, 1978), cert. denied, 100 Supreme Court, 262 (1979):

"Admissibility, we think, should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's First Amendment rights."

In undertaking the requisite balancing analysis, it is clear from the applicable authorities that the Trial Court is vested with broad discretion. See, for example, Lamb Enterprises, Inc. v. Toledo Blade, 461 Fed. 2d 506, 516 (Sixth Circuit, 1972), cert. denied, 409 U.S. 1001 (1972), cert. denied, 409 U.S. 1001 (1972); Household Goods Carriers Bureau v. Terrell, 452 Fed. 2d 152, 158, (Fifth Circuit 1971); Weit v. Continental Illinois National Bank and Trust Company of Chicago, 467 Fed. Supp. 197 (N.D. Illinois, 1978) at 207-208; United States v. Southern Motor Carriers Rate Conference, 439 Fed. Supp. 29, 47 (N.D. Georgia, 1977); United States v. Johns Mannsville Corporation, 259 Fed. Supp. 440, 453 (E.D. Pennsylvania 1966), cited with approval in Lamb **[1265]** Enterprises.

In the exercise of its discretion, the Court is constrained to conclude at this juncture that the probative value of the proposed stipulations does not outweigh their likely prejudicial effect.

The Court would observe in this regard that the probative value of the evidence in question is significantly undermined by the defendant's express admissions in this case.

Thus, in the course of the defendant's statement, CEI has readily admitted to the jury that it fully "intended to reduce or eliminate competition between it and Muny Light."

Transcript, at page 615-616; that the defendant "did not wish to interconnect with Muny Light," transcript at 616; and the CEI affirmatively "resisted interconnection." See transcript at 617.

In view of the diminished probative value of the evidence in issue, and in light of the fact that the defendant's conduct in underwriting the taxpayers' suit would appear to constitute protected activity under the Noerr-Pennington doctrine, and the First Amendment underpinnings thereof, the Court is currently of the opinion **[1266]** that it would be error to admit the proffered evidence over the defendant's objections.

Bring in the jury, gentlemen.

* * * * *

APPENDIX F

Order of the United States District Court

[Published at 538 F. Supp. 1328]

(Filed May 18, 1981)

Civil Action No. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendant

MEMORANDUM AND ORDER

KRUPANSKY, *J.*

On November 19, 1980 an eleven week trial of the instant action concluded in a mistrial as a result of the jury's inability to reach a verdict. Upon dismissing the jury and declaring a mistrial, the Court scheduled the retrial of this case for January 19, 1981. Upon the motion of the plaintiff City of Cleveland (City) for a continuance, the matter at bar was rescheduled for trial on May 18, 1981.

Presently before the Court is a motion by defendant Cleveland Electric Illuminating Company (CEI) to rec-

ognize as binding during the impending retrial some twenty-one (21) Orders issued by the Court during or immediately prior to the initial trial which disposed of certain issues in this case. Among the Orders identified by CEI are the Court's determinations of October 20, 1980 and October 31, 1980, wherein the Court, in granting in pertinent part the defendant's motions for a directed verdict pursuant to Rule 50(a), Fed. R. Civ. P., concluded, as a matter of law, that insufficient evidence had been adduced to support a number of the plaintiff's substantive claims. The City has responded in opposition to the instant motion.

The Court observes preliminarily that comparatively little authority exists, in both reported cases and learned treatises, upon the status at a retrial of those issues which were the subject of dispositive rulings by the court at the original trial and which therefore were not in issue at the time the case was submitted to the original jury. There is, however, no dispute either among the authorities or between the instant parties, that all issues actually submitted to the jury at the previous trial may be retried *de novo*. Further, it is uniformly agreed that a mistrial does not affect or invalidate any of the pretrial proceedings in the case. Therefore, the precise concern of this Court is with the viability at the retrial of certain authoritative dispositions propounded during the preceding trial of this action.

In opposing the instant motion, the City contends that a mistrial is "equivalent to no trial", leaving the parties entirely free to relitigate even those matters which were the subject of dispositive rulings in the course of the initial trial. The City urges in particular that it is fully entitled to redeterminations of those rulings which were in any way premised upon the state of evidence

at the time of their issuance in that new evidence could, at least conceivably, be introduced which might warrant a departure from the Court's previous determinations. In advancing this contention, the City does not allege that it was denied a full and fair opportunity at the first trial to adduce evidence in support of its various substantive claims. It would appear instead that, in seeking to relitigate the matters which were specifically resolved in the first trial, the City is simply petitioning the Court for an opportunity to accomplish at the retrial that which it was unable to accomplish in the course of the earlier proceeding. The City's insistence upon relitigating previously determined issues ensues notwithstanding the fact that the plaintiff virtually concedes that the overwhelming majority of the Court's original rulings will, if reconsidered in the course of the retrial, ultimately be reaffirmed. And while the City vaguely suggests that new evidence may be introduced at the retrial which might induce the Court to alter or modify certain of its prior dispositions, the plaintiff has made no effort to apprise the Court of the nature and extent of such evidence, the manner in which the evidence might impact upon the the Court's former determinations, or the reasons underlying the City's failure to present the evidence in question at the first trial. The plaintiff nonetheless maintains that adherence to the dispositive rulings rendered in the course of the original trial would constitute an inappropriate application of the "law of the case" doctrine which, the City asserts, is purely an appellate principle.

Existing legal precedent quite clearly fails to support the City's foregoing contentions. The case of *Remco, Inc. v. Faber Brothers, Inc.*, 34 F.R.D. 259 (N.D. Ill. 1964) is particularly instructive. In that action, the plaintiff, following the district court's declaration of a mistrial,

sought to retry a Sherman Act count which had been dismissed at the first trial pursuant to Fed. R. Civ. P. 41(b) for insufficiency of evidence. In concluding that the plaintiff was not entitled to relitigate the previously dismissed count, Judge Hubert Will, in his well-reasoned opinion, stated:

> Plaintiff reasons that, a mistrial having often been said to be no trial at all, the retrial is a de novo litigation of all elements of the previous trial. This neglects to recognize the fact that the decision which the jury was not able to reach—the impasse which necessitates the retrial of this action—related only to the counts still in the case at the time the jury was sent out to deliberate.
>
> The Sherman Act count was held to be invalid as a matter of law. That ruling was based on the insufficiency of plaintiff's evidence. The second trial is not intended to afford either party an opportunity to fortify a position it was unable to maintain in the previous trial. The second trial is limited to a presentation of evidence on issues upon which the jury at the first trial was unable to agree. The retrial is the result of a deadlock upon certain issues submitted to the jury and is thus limited to those issues. 34 F.R.D. at 260.

The opinion in *Remco* recognizes that the fundamental purpose of a retrial is to afford a new jury an opportunity to reach a final disposition of only those issues which were left unresolved by the failure of the original jury to agree upon a verdict. That is to say, a mistrial occasioned by the jury's inability to arrive at a verdict does not convert those matters which were previously the subject of dispositive rulings by the trial court to

matters the litigants are free to relitigate *de novo* in the second trial. Stated differently, a retrial is not designed "to afford either party an opportunity to fortify a position it was unable to maintain at the previous trial." *Id. Accord, Souza v. Corvick*, 441 F.2d 1013, 1017-1019 n.6 (D.C. Cir. 1970). To hold otherwise would subject parties at a retrial to either futile litigation to foregone conclusions or to confusing inconsistencies in the rulings of the Court. Of at least equal significance, a contrary result would ignore the established principle that a litigant is generally entitled to but a single opportunity to present and prevail upon his claim; a principle which is fundamental to our system of jurisprudence.[1]

Remco thus properly counsels that a retrial following a mistrial is a trial *de novo* only as to those issues actually remaining in controversy, *i.e.* those matters which were not the subject of dispositive rulings by the trial court during the course of the earlier proceeding. *United States v. Mischlich*, 310 F. Supp. 669 (D.N.J. 1970), *aff'd sub nom. United States v. Pappas*, 445 F.2d 1194 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971), the case authority upon which the City primarily relies, does not hold otherwise. In *Mischlich*, the specific issue before District Judge Steel was whether a criminal defendant's failure to object to

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1. This principle so permeates American jurisprudence that it obtains even at the pleading stage of litigation. Thus a plaintiff who, in drafting his complaint, fails to state a claim upon which relief can be granted invites dismissal pursuant to Rule 12(b)(6), Fed. F. Civ. P., which, in the absence of a contrary specification by the district court, operates as an adjudication on the merits which warrants full *res judicata* effect. *Shaw v. Merrit-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir.), *cert. denied*, 434 U.S. 852, 98 S.Ct. 167 (1977); *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864, 865 (6th Cir. 1968), *cert. denied*, 394 U.S. 998, 89 S.Ct. 1594 (1969); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978). *Mervin v. Federal Trade Commission*, 591 F.2d 821, 831 (D.C. Cir. 1978); *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 592-93 (8th Cir. 1968); *Hubricki v. ACF Industries, Inc.*, 484 F.2d 519, 523 (3d Cir. 1973).

venue during the course of his first trial foreclosed the defendant from raising the objection at his retrial. In concluding that the defendant was free to challenge venue at the retrial, the Court opined:

> The declaration of a mistrial renders nugatory all trial proceedings with the same result as if there had been no trial at all. *See* 58 C.J.S. Mistrial at 833-834 (1948). The situation which exists is analogous to that which results from an appellate reversal and remand for new trial. *See* 5 Am.Jur.2d Appeal and Error §955 at 382 (1962). The parties are returned to their original positions and, at the new trial, can introduce new evidence and assert new defenses not raised at the first trial. 310 F.Supp. at 672.

It is apparent from the foregoing that *Mischlich* does not address itself to instances where issues were actually raised and specifically resolved by the trial court in the course of the initial trial. That is to say, *Mischlich* does not support the plaintiff's assertion that the right created by a mistrial to "introduce new evidence" or "assert new defenses" attaches to those issues which were the subject of dispositive rulings by the trial court during the course of the first trial. To construe *Mischlich* in the expansive manner proposed by the City would, *inter alia*, ignore the established principle that a disposition entered in the form of a directed verdict pursuant to Fed. R. Civ. P. 50(a) "is necessarily a disposition with prejudice." 5A Moore's Federal Practice ¶50.03[1] at p. 50-42 (2d ed. 1980). *Mischlich* then, fairly viewed merely supports the rule that, as to those issues left unresolved in the first trial, parties at the retrial are not limited by the evidence previously adduced or the tactics formerly employed in the earlier proceeding.

The Court thus finds entirely unpersuasive the City's contention that adherence to the principles espoused in *Mischlich* requires that the retrial of this cause proceed entirely unencumbered by the dispositive rulings heretofore rendered by the Court during the course of the first trial. The Court finds similarly unpersuasive the plaintiff's assertion that the law of the case doctrine is solely a principle of appellate review which has no application to legal rulings issued by a trial court. As articulated by Professor Moore in his commentary on the law of the case:

> [T]he federal doctrine of the law of the case applies to principles of law enunciated by the trial court and by the appellate courts. When, therefore, a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases under the doctrine of stare decises, but, as a general proposition, it establishes the law, * * * which it itself will, normally apply to the same issues in subsequent proceedings in that case. 1B Moore's Federal Practice ¶0.404[1] at pp. 402-03 (2d edition 1980).[2]

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2. *Mischlich* itself appears to be contra authority to the City's assertion that law of the case principles are exclusively appellate and do not obtain in the instant context. *Mischlich* specifically notes that a retrial following a mistrial is analogous to the situation "which results from an appellate reversal and remand". *Id.* at 672. It is beyond peradventure that decisions rendered by an appellate court upon review of a case are binding during any subsequent retrial of the same action held upon remand. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291 (1895); *Baltimore & Ohio R. R. v. United States*, 279 U.S. 781, 49 S.Ct. 492 (1929); *Briggs v. Pennsylvania R. R.*, 334 U.S. 304, 68 S.Ct. 1039 (1948). *See also Wolfe v. Continental Casualty Co.*, ... F.2d ....., No. 78-3385 (6th Cir. May 6, 1981); *City of Cleveland v. Federal Power Comm'n.*, 561 F.2d 344, 346 (D.C. Cir. 1977). It would thus appear by the reasoning of *Mischlich* that dispositive rulings rendered by a court during a mistrial and rulings promulgated upon review by an appellate court are equally deserving of law of the case status at the retrial of the given action.

For the foregoing reasons, the Court concludes that the dispositive rulings contained in the Orders designated below comprise the law of the case which, in the absence of a convincing showing that the declared law is clearly erroneous and that adherence thereto will "work a grave injustice", 1B Moore's Federal Practice ¶0.404[1] at p. 405, shall govern the retrial of this cause commencing May 18, 1981. The Court does not mean to imply, of course, that the fact the following Orders have acquired law of the case status in any way exempts the rulings from the scrutiny of appellate review which may obtain upon the entering of a final judgment in the cause:

1. August 7, 1980 – (Denying City's motion for jury instruction on Voir Dire)[3]

2. August 7, 1980 – (Defining scope of inquiry at Voir Dire);

3. September 4, 1980 – (Denying City's motion to exclude from the venire all CEI or Muny Light customers);

4. September 13, 1980 – (Denying City's motion for leave to present evidence to the jury in support of the plaintiff's tolling contentions);

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3. The parenthetical descriptions of the Court's various Orders which apply to the retrial of this matter are here given solely to facilitate reference to the specific Order being cited and the instant description is not in any sense a modification of the original Order nor an independent characterization by this Court of any issue, argument or position. The substantive rulings listed herein speak for themselves.

5. September 13, 1980 – (Ordering pretrial production of data underlying expert reports);

6. October 1, 1980 – (Rejecting CEI's contention that certain settlement transactions served to release the defendant from liability; holding that CEI's liability must be premised upon unilateral conduct);

7. October 14, 1980 – (Barring the introduction of certain anticipated expert testimony);

8. October 14, 1980 – (Finding the interstate commerce provisions of §2 of the Sherman act to be satisfied);

9. October 14, 1980 – (Barring the introduction of "MELP Meter Bureau Reports", PTX 1816 through 1829 and PTX 2423 and 2424);

10. October 15, 1980 – (Finding Constitutional authority for creation of a power surplus by City for resale);

11. October 20, 1980 – (Defining the relevant product market; ruling out claims based upon denial of CAPCO membership and other specified allegations; fixing the burden of proof on the issue of natural monopoly);

12. October 23, 1980 – (Barring the introduction of evidence relating to the operation of certain City Divisions);

13. October 23, 1980 – (Barring the introduction of PTX 569 as protected by the attorney-client privilege);

14. October 31, 1980 – (Defining the scope of permissible argument to the jury regarding the relevant geographic market);

15. October 31, 1980 – (Taking judicial notice of certain statutes and their authoritative construction);

16. October 31, 1980 – (Barring the use of the "pass-on" defense and limiting any damages for refusal to wheel to the current PASNY contract).

CEI has, in conjunction with its assertion that the City is currently precluded from maintaining that the relevant geographic market consists of the entire service territory of CEI, petitioned the Court for an order barring the introduction of all "evidence concerning CEI's relations with Painesville or CEI's efforts to acquire privately-owned generation in parts of its service area other than the City of Cleveland." This Court has previously intimated, however, *see e.g.* transcript at pp. 1714-1717; 2229-2234, that evidence of anticompetitive conduct undertaken by the defendant outside the Cleveland area may nonetheless be introduced if, *inter alia,* "it tends reasonably to show the purpose and character of the particular transactions under scrutiny". *Federal Trade Commission v. Cement Institute,* 333

U.S. 683, 705, 68 S.Ct. 793 (1948), *citing Standard Oil Co. v. United States,* 221 U.S. 1, 31 S.Ct. 502 (1911). The Court is not persuaded that a departure from this tribunal's previous determinations on this matter is currently warranted.

CEI also seeks to exclude from the retrial all evidence concerning the defendant's operation of the 11 kv load transfer points as well as the 69 kv non-synchronous interconnection. The Court, however, cannot agree at this juncture of the proceeding that evidence of this nature is necessarily irrelevant to the issues remaining in controversy. The Court will accordingly defer ruling on the matter until the appropriate interval at trial, wherein the defendant's contention can be more properly assessed.

CEI further urges the Court to decree that the fact the defendant's so-called Muny Displacement Program may have been "outside the scope" of CEI's tariff with the PUCO, or perhaps "in violation of" said tariff, is of no relevance to the instant action. In assessing this contention, the Court finds its oral pronouncements of October 2, 1980 instructive:

> The Court: Now, wait a minute. We are talking about two different things now, Mr. Lansdale.
>
> You are talking about whether or not the City should be permitted to introduce evidence that the expenditures incurred for the, or in the course of the MELP displacement program were contrary to the tariffs that CEI had filed with the P.U.C.O.
>
> Mr. Lansdale: Well—
>
> The Court: I shouldn't say "contrary." Beyond the tariffs filed with the P.U.C.O.
>
> Mr. Lansdale: Yes.

The Court: I think that they are permitted to do that.

However, I do not believe that they can take the next step, namely, that because they are beyond the tariff filed with the P.U.C.O. it infers a violation of State law, ergo, a violation of the Sherman Antitrust Act.

Now, that, you are not going to be able to show, and I will tell you that right now, because that is not the law.

If you are going to show a specific intent here, the specific intent goes to a violation of the Sherman Antitrust Law and not to the violation of some state law. I don't know whether or not the action of a person beyond a tariff filed with the P.U.C.O. constitutes a violation of state law or of a regulation of the Public Utilities Commission, but that adjudication is not for this Court to undertake, Mr. Lansdale. And I am not going to get into that part of it, either.

That appears to me to be an adjudication to be undertaken with the Public Utilities Commission and any appeals therefrom.

Transcript at pp. 3082-3084.

The Court remains of the opinion that the jury, in assessing the propriety of the defendant's conduct, is entitled to consider the fact that certain of the incentives offered prospective customers under the Muny Displacement Program were not included within the utility's tariff on file with the PUCO. The Court does not intend to permit, however, testimony or argument which opines that conduct undertaken by CEI pursuant to its Muny Displacement Program constituted a *violation* of the applicable state law, as this determination would appear to be one

entrusted not to this tribunal but rather to the specialized expertise of the PUCO.

CEI has argued in addition that the plaintiff has, in effect, abandoned its contention that the defendant has, through the Muny Displacement Program, engaged in predatory pricing. It would indeed appear from the record that the City is no longer maintaining that the Muny Displacement Program employed below cost pricing, *see* transcript at pp. 6540-6542, but has instead taken the position that the conduct undertaken by CEI in implementing the program was, notwithstanding the absence of below cost pricing, "sufficiently 'unreasonably anti-competitive' in nature and effect as to be deemed 'predatory' or 'unfair' ". Transcript at p. 6609. The Court will, however, in order to afford the parties an opportunity to further enlighten the Court as to their respective positions on this matter, defer ruling on the instant contention until the appropriate juncture at trial.

The Court has, after careful consideration, determined that the interests of justice would be best served by deferring ruling on the admissibility of stipulations 226-241, which pertain to the so-called Miller suit. This tribunal does not intend, however, to reconsider its oral ruling of September 19, 1980 insofar as it rejected, as a matter of law, the plaintiff's contention that the conduct described in the stipulations is within the ambit of the "sham" exception to the *Noerr-Pennington* doctrine. *See* transcript at pp. 1243-1266. That is to say, the Court's determination that the defendant's conduct in underwriting the instant taxpayer suit constitutes protected activity under the *Noerr-Pennington* doctrine, and the First Amendment underpinnings thereof, will apply to the retrial proceedings. In light of the fact the stipulations in question may nevertheless be properly introduced into evidence for the limited

purpose of demonstrating the purpose and character of the particular transactions under scrutiny upon a showing by the offering party that their probative value outweighs the likely prejudicial effect, the Court will defer ruling on the admissibility of the stipulations until the appropriate interval at trial, at which time the balancing analysis prescribed by the applicable authorities, *see e.g. Feminist Health Center v. Mahommed*, 586 F.2d 530, 543 (5th Cir. 1978), *cert. denied*, 100 S.Ct 262 (1979), can be more properly undertaken.

The parties are in agreement that the exhibits admitted into evidence during the first trial may similarly be admitted at the retrial, provided, of course, the objections previously interposed by the litigants are preserved for purposes of appeal. The Court, being of the view that this suggested procedure will serve to expedite the retrial of this cause, will accede to the parties' request and undertake to implement their proposal at the outset of the retrial proceedings. With regard to those exhibits which were denied admission at the first trial, the Court would advise the parties that it fully intends to adhere to its previous determinations unless and until the Court is persuaded that the defect or defects which precluded a particular exhibit's admission into evidence at the initial trial have, by reason of newly adduced evidence or otherwise, been remedied in the course of the retrial proceedings. In the absence of such circumstances, the Court will not burden the retrial proceedings by needlessly reconsidering its prior evidentiary rulings.[4]

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4. The Court is of the opinion that the evidentiary defects which necessitated exclusion of PTX 569 (*i.e.*, attorney-client privilege) as well as PTX 1816-1829 and 2423-2424 (*i.e.*, inherently unreliable hearsay) are not reasonably susceptible of cure in the retrial of this cause. The Court has accordingly included its Memorandum and Orders of October 14, 1980 and October 23, 1980 within the list of those prior determinations which will also govern the impending retrial proceedings.

To facilitate the orderly pretrial of this action, the parties are hereby directed to jointly prepare and submit to the Court, on or before May 22, 1981, a list of those previously admitted exhibits which the litigants are desirous of introducing in the course of the retrial proceeding. The parties are further directed to jointly prepare and submit to the Court by the aforesaid date an additional list identifying those exhibits the litigants are intending to reoffer at the second trial which were denied admission at the previous trial. This latter list shall specify with respect to each exhibit any and all objections the opposing party intends to interpose in the course of the retrial proceeding.

CEI lastly seeks a pretrial order barring, unless prior permission is secured from the Court, the mode of witness interrogation whereby trial exhibits are read verbatim to a witness who has no familiarity whatsoever with the document in question. While the Court agrees that this improper mode of questioning was utilized all too frequently during the initial trial, necessitating repeated admonitions from the Court, the Court will refrain from imposing the requested prohibition at this time. The Court would advise the parties, however, that it will not hesitate to impose such a prohibition in the event counsel for either of the litigants persist in employing this improper technique in the retrial proceedings.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX G

Order of the United States District Court

(Filed July 30, 1981)

Civil Action No. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff,

v.

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY,
Defendant.

ORDER

KRUPANSKY, *J.*

Presently before the Court is what is styled "Motion of the City of Cleveland for Reconsideration of this Court's Determination that the Miller Taxpayer Suit Constitutes Protected CEI Activity under the Noerr-Pennington Doctrine". Defendant CEI has, by memorandum of July 16, 1981, responded in opposition.

A review of the record discloses that in submitting the instant motion, the City is essentially reasserting the identical contentions which were previously considered and expressly rejected by the Court in its oral ruling of September 19, 1980. The Court, having once again reviewed

the governing authorities, remains of the opinion that its September 19th decree represents a proper application of the principles comprising the *Noerr-Pennington* doctrine.

In addition to simply reiterating the arguments which were previously found wanting by the Court, the plaintiff has also suggested that no "compelling First Amendment considerations" presently require the exclusion of the Miller suit stipulations in view of the fact the stipulations were ultimately divulged to the jury in the course of the first trial, thereby becoming, for purposes of the prior proceedings, "a matter of public record". This assertion fails to recognize that under the *Noerr-Pennington* doctrine, undue prejudice to an antitrust defendant's First Amendment interests ensues not from the mere fact the constitutionally protected activity is publicly disclosed, but rather from the fact that evidence of such protected activity is likely to be considered and utilized by the jury as a legally inappropriate basis for liability, upon which monetary damages may be improvidently assessed. *See e.g. Household Goods Carrier's Bureau v. Terrell*, 452 F.2d 152, 158-59 (5th Cir. 1971) (en banc). The City's suggestion then that the instant defendant's First Amendment rights are no longer significantly implicated in this controversy is not persuasive.

It appearing to the Court that the plaintiff has failed to demonstrate that this tribunal's pronouncements of September 19, 1980 are "clearly erroneous" or that "adherence thereto will 'work a grave injustice' ", Memorandum and Order of May 18, 1981 at p. 6, the City's motion for reconsideration is hereby denied.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX H

Oral Order of the United States District Court

(August 3, 1981)

[12,624] The Clerk: The City of Cleveland, Plaintiff, versus the Cleveland Electric Illuminating Company, Defendant. Civil Action No. C75-560.

* * * * *

[12,626] The Court: Please be seated.

Gentlemen, I have reviewed the motion the plaintiff most recently filed for reconsidering the Court's previously issued rulings as it relates to the application of the Noerr-Pennington doctrine to both the $9.8 million capital funds issue and the Miller lawsuit.

Obviously the plaintiffs had not attempted to read Lansdale, or they don't understand the implication of Lansdale.

The purpose of the Noerr-Pennington doctrine, as enunciated by the United States Supreme Court, is to protect against any "chilling effect" upon the exercise of First Amendment rights by providing a means to preclude a jury from considering or premising liability upon immunized legislative, judicial, or other similar type activity.

The conduct which is the subject of the plaintiff's current motion for reconsideration is a protected First Amendment activity falling directly within the pronouncements of Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); **[12,627]** California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972).

The Court has considered and ruled upon the issue on three separate occasions, i.e., September 19, 1980 in an oral opinion (Transcript of the first trial, pages 1243 through 1266); May 18, 1981, in a written order; and July 30, 1981 in a written order.

Indeed, in its September 19, 1980 decree, the Court having before it a complete factual record upon which to predicate its determination, see Joint Stipulations 227 through 241, expressly rejected as a matter of law the plaintiff's contention that the conduct in question was within the ambit of the "sham exception" to the Noerr-Pennington doctrine. The Court reaffirms its heretofore issued decisions.

Moreover, for the reasons that follow, it is readily apparent that the case currently relied upon by the City, Lansdale v. Philadelphia Electric Co., Civil Action 79-2533 (E.D. Pa. June 4, 1981), which is patently distinguishable from the case at bar, is not inconsistent with this Court's prior resolutions.

[12,628] A review of the opinion in Lansdale discloses that the plaintiff sought in counts two and three of its complaint to utilize ostensibly constitutionally protected activity as a basis for Sherman Antitrust liability and damages.

In view of the fact that the ostensibly constitutionally protected activity constituted the very conduct upon which the Sherman Act liability was to be predicated, the Pennsylvania District Court, under the circumstances of the case, properly permitted the jury to consider and assess that activity in determining whether the "sham exception" had been properly invoked.

The Philadelphia District Court recognized the well-established principle that the "sham exception" to the

Noerr-Pennington doctrine is designed to render otherwise constitutionally protected activity actionable under the Sherman Antitrust Act, and to permit an award of damages thereupon.

In the instant action, however, the City advances no contention that the defendant's described conduct as stipulated in Stipulations Nos. 227 through 241 and the proferred bond issue testimony is actionable under the Sherman Antitrust **[12,629]** Act. Indeed, the City in its supporting brief filed with its present motion candidly concedes that it "does not ground Sherman Act liability upon CEI's conduct with respect to the Miller suit or the $9.8 million bond issue." This acknowedgement is entirely consistent with Plaintiff's previous representations. Thus, in the City's brief of September 18, 1980, plaintiff clearly stated that it "has not alleged this CEI-sponsored taxpayer suit as a violation of the Sherman Act and does not seek predicate damages upon the suit." ID. at 3. Similarly, the plaintiff's brief of October 3, 1980, plaintiff acknowledged that it "is not basing a claim for relief upon the efforts undertaken by CEI to prevent the City from obtaining a vitally needed capital for MELP." ID. at 1.

The City, it appears, is currently seeking to introduce the evidence in question not to establish a basis of liability, but rather for the sole purpose of establishing CEI's intent.

With respect to the utilization of protected conduct solely as evidence of intent and not as a basis for liability, the holding in Lansdale is harmonious with the prior decisions herein.

[12,630] In addressing the plaintiff's motion to adduce evidence of Philadelphia Electric's conduct before regulatory agencies solely to show antitrust intent behind a re-

fusal to wheel, the Pennsylvania District Judge reiterated the test employed by this Court, and explicitly pronounced by the Supreme Court in Pennington, namely that it is within the discretion of the trial judge to admit the evidence upon the issue of intent "if he deem(s) it probative and not unduly prejudicial." 381 U.S. at 670 n.3;

This Court has consistently applied the above test in the instant matter and Lansdale is in no respect inconsistent with this principle.

Accordingly, this Court reaffirms its opinions heretofore issued the City's second motion for reconsideration is overruled.

That disposes of the motion, the City's motion for reconsideration as to the Court's previous rulings concerning the application of the Noerr-Pennington doctrine.

I have nothing further, gentlemen. We will resume in about 15 minutes.

Approach the bench.

APPENDIX I

Order of the United States District Court

[Published at 538 F. Supp. 1274]

(Filed August 17, 1981)

Civil Action No. C75-560

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND,
Plaintiff,

v.

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY,
Defendant.

MEMORANDUM AND ORDER

KRUPANSKY, J.

By motion filed February 25, 1976, defendant, The Cleveland Electric Illuminating Company (CEI) sought a pretrial evidentiary ruling from this Court on the admissibility of certain documentary evidence intended to be introduced by plaintiff at trial and bearing upon CEI's attempts to influence members of the Cleveland City Council, public officials, government agencies, general public opinion, and members of the news media with respect to the operation of Cleveland's Municipal Electric Light Plant (MELP), the rates charged for power generated by

MELP, and the ultimate disposition on MELP. In support of its request, defendant invoked the *Noerr-Pennington* doctrine which exempts from sanction under the Sherman Act, activities directed toward influencing the passage or enforcement of legislation.

By Order issued September 13, 1978, this tribunal overruled the Motion as premature concluding "that a ruling upon the admissibility of the subject evidence . . . would, at this time, be entered prematurely and without proper consideration of all of the relevant facts and circumstances which necessarily impact any evidentiary ruling made during the course of trial." *City of Cleveland v. CEI*, Case No. C75-560 (N.D. Ohio September 13, 1978), slip. op. at 5. The Court further posited:

> Therefore, the appropriate time to raise any objection to the subject documentary evidence is the point at which it is first introduced at trial. At that time, the Court shall entertain the objections of any defendant and rule thereon with greater appreciation of the relevancy and materiality of such evidence, given the facts and circumstances surrounding its development.

Id.

A. *THE NOERR-PENNINGTON DOCTRINE*

The doctrine itself was examined in this tribunal's Order of September 13, 1978 wherein the Court stated:

"*In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Supreme Court of the United States announced what later became known as the *Noerr-Pennington* doctrine. Through Justice Black, the Court therein stated at 135-136:

> We accept, as the starting point for our consideration of the case, the same basic construction of the

> Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in Standard Oil Co., of New Jersey v. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government as long as the law itself does not violate some provision of the Constitution. (footnotes omitted).

Enlarging upon this theme, the Court went on to exclude from the purview of the Sherman Act, combinations and conspiracies to attempt to influence the passage of legislation through persuasion of the legislative and executive branches of government. Justice Black continued at 136, 137:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] * * * in restraint of trade," they bear very little if

> any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by §1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that a question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws. (footnote omitted).

The Supreme Court premised its holding upon two precepts of law which touch the very foundations of freedom and democracy in our constitutional form of government. First, the Court propounded,

> [i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the

> government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. *Id.* at 137. (footnote omitted).

Describing the second premise as one "of at least equal significance," *id.*, the Court went on to recognize that

> [t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. *Id.* at 138.

In summary, the Court concluded:

> [I]nsofar as that Act [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. *Id.* at 140.

In a later case, *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965), the Supreme Court reaffirmed its pronouncement in *Noerr Motor Freight* and held that Sherman Act liability could not be premised upon attempts to influence the Secretary of Labor and Tennessee Valley Authority officials to modify their official policies. The Court, interpreting *Noerr Motor Freight* stated:

> In Eastern R. R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activi-

> ties of competitors seeking to influence public officials. The Sherman Act, it was held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed. Furthermore, the legality of the conduct "was not at all affected by any anticompetitive purpose it may have had," id., at 140, 81 S.Ct. at 531—even though the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business," id., at 138, 81 S. Ct. at 530. Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved.

The Court further explained that the *Noerr-Pennington* doctrine

> shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose.

Id. at 1593.

Thus, the *Noerr-Pennington* doctrine, as enunciated in the two cases from which its name is derived exempts from sanction under the Sherman Act, activities directed toward influencing the *passage* or *enforcement* of legislation, i.e. petitioning or otherwise lobbying the *legislative branch* of government for the passage of laws or pressuring the *executive branch* for their enforcement. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed. 2d 641 (1972). In *California Motor Transport, supra,* the United States Supreme Court again reaffirmed the *Noerr-Pennington* doctrine and extended its coverage to overtures made by private citizens or groups and directed at "administrative

agencies (which are both creatures of the legislature and arms of the executive) and . . . courts, the third branch of government." *Id.* at 611-612. The Court went on to say:

> Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.
>
> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

See also Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 543 (5th Cir. 1978), *cert. denied,* 100 S.Ct. 262 (1979). The Court, however, went on to announce the "sham" exception to the *Noerr-Pennington* doctrine holding that where there emerges "a pattern of baseless repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused" by an individual or group with the intent to "harass and deter their competitors from having 'free and unlimited access' to the agencies and courts," a violation of the antitrust laws has been established. *Id.* at 613-614.

UNDERLYING THEORY

As alluded to hereinabove, the *Noerr-Pennington* doctrine rests primarily upon two firmly established precepts of law.

Apparent from the Supreme Court's pronouncement in *Noerr Motor Freight* is the fact that the doctrine has First Amendment underpinnings; immunizing from antitrust lia-

bility the right of the people to engage in political activity and petition their government.

Secondly, the Noerr-Pennington doctrine is related to the equally well-established "state action" doctrine enunciated by the Supreme Court in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Indeed, in *Noerr Motor Freight, supra,* the Court stated:

> It has been recognized, at least since the landmark decision of this Court in Standard Oil Co., of New Jersey v. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government as long as the law itself does not violate some provision of the Constitution. (footnotes omitted).

EVIDENTIARY RAMIFICATIONS

Although the *Noerr-Pennington* doctrine is not, strictly speaking, a rule of evidence, it does carry some evidentiary ramifications. In *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585 (1965), the United States Supreme Court undertook to consider, however briefly, the evidentiary impact of its holdings in *Noerr* and *Pennington.* In an oft-cited footnote, the Court, through Justice White, stated:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony or prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

Construing this language, lower federal courts have consistently reiterated that the trial judge is vested with broad discretion in determining the admissibility of evidence of conduct falling within the protection of the *Noerr-Pennington* doctrine. *See e.g., Lamb Enterprises, Inc. v. Toledo Blade Co.,* 461 F.2d 506, 516 (6th Cir. 1972), *cert. denied,* 409 U.S. 1001 (1972); *Household Goods Carrier's Bureau v. Terrell,* 452 F.2d 152, 158 (5th Cir. 1971) (*en banc*); *Weit v. Continental Illinois National Bank and Trust Company of Chicago,* 467 F.Supp. 197 (N.D. Ill. 1978) at 207-208, n.22; *United States v. Southern Motor Carrier's Rate Conference,* 439 F.Supp. 29, 47 (N.D. Ga. 1977); *United States v. Johns-Manville Corp.,* 259 F.Supp. 440, 453 (E.D. Pa. 1966), *cited with approval in Lamb Enterprises, supra.*

Moreover, those courts which have passed upon the issue have employed a balancing test to determine the admissibility of such evidence. In *Feminist Women's Health Center v. Mohammad,* 586 F.2d 530 (5th Cir. 1978), *cert. denied,* 100 S.Ct. 262 (1979), the Fifth Circuit Court of Appeals elaborated:

> Admissibility, we think, should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admis-

> sion of the evidence will prejudice the defendant's first amendment rights.

Id. at 543 n.7. The Court went on to hold that the probative value of the evidence was far outweighed by the defendant's First Amendment interests. And, in *Lamb Enterprises, Inc. v. Toledo Blade Co., supra,* this very Court (Judge Krupansky) denied admissibility of a letter which related a contemplated course of action directed at the Toledo City Council and intended to "forestall a competitor" finding that the prejudicial impact thereof far outweighed its probative value. The Sixth Circuit affirmed, holding that the aforesaid ruling did not constitute an abuse of discretion.

At this juncture of the proceedings, and as a part of its case-in-chief, the plaintiff seeks through the examination of Donald H. Hauser, defendant's general attorney, to enter upon a course of inquiry, the sole purpose of which is to elicit testimony of CEI's intent or design to delay, impede or make more costly, the construction and completion of a 69KV interconnection between the period March through December 19, 1972, thereby triggering the introduction of protected *Noerr-Pennington* evidence incorporated in Stipulations 226 through 241 heretofore excluded by this Court for the reasons set forth in its oral opinion of September 19, 1980. (Transcript of original trial 1243-1266).

At the first trial of this cause, the Court ultimately acceded to plaintiff's request to introduce the evidence incorporated into Stipulations 226 through 241 only after the defendant had affirmatively elicited from its own witnesses during the presentation of the defendant's case-in-chief evidence which compelled the inference that CEI undertook no conduct to impede, hinder or delay the con-

struction of the 69KV temporary emergency interconnection. In permitting the stipulations to be read to the jury, the Court adopted the pronouncements of the Fifth Circuit in *Household Goods Carrier's Bureau v. Terrell, et al.*, 452 F.2d 152, 158 (5th Cir. 1971) (*en banc*). In that case, the Court of Appeals authorized the introduction of evidence of protected activity "to rebut the insinuations *put into evidence by the defendants*". *Id.* (emphasis supplied). That is to say, the Court sanctioned the use of *Noerr-Pennington* evidence only after the defendants themselves had "opened the door" by introducing evidence designed to create, in the minds of the jury, prejudicial inferences which could only be dispelled by the admission of constitutionally protected activity.

Both the Fifth Circuit in *Household Goods* and this Court during the first trial, recognized that a defendant may, through the presentation of its own evidence, "open the door" to the introduction of privileged *Noerr-Pennington* conduct. However, neither the Fifth Circuit opinion in *Household Goods* nor this Court's prior decision in the first trial lend the slightest support to the City's assertion that a plaintiff may, at will, trigger the admission of the constitutionally protected activity simply by undertaking a course of examination which is solely designed to create an inference which may be dispelled by disclosure of the protected activity. To adopt the City's position would emasculate and indeed gut the constitutional protection afforded under the *Noerr-Pennington* doctrine and have a "chilling effect" upon the exercise of First Amendment rights.

To preserve the integrity of the *Noerr-Pennington* doctrine, this Court, in accordance with the pronouncements of the Fifth Circuit in *Household Goods*, is of the opinion that the instant plaintiff must be foreclosed from undertaking

a course of examination which is specifically and solely designed to trigger the admission of the constitutionally protected activity here in question.[1] In light of the fact the only instance of protected conduct sought to be introduced herein relates to a lawsuit which, the City concedes, did not actually affect the construction of the 69KV intertie, the plaintiff may not inquire as to activity undertaken by CEI which was merely "designed" to delay, impede, or make more costly the construction of the 69KV temporary emergency interconnection. This is not to foreclose the City from adducing evidence of unprotected activity which the plaintiff maintains did in fact delay, impede or make more costly the said interconnection.

Although plaintiff may not, at this juncture, initiate inquiry designed solely to trigger admission of *Noerr-Pennington* comduct, the Court recognizes, of course, that the evolution of the defendant's evidence may "open the door" for the introduction of such conduct, as occurred during the first trial.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

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1. The Court finds entirely unpersuasive the City's contention that the heretofore adduced testimony of Hauser has already served as a predicate for the introduction of the constitutionally protected activity described in Joint Stipulations 226-241. A review of the testimony in question discloses beyond peradventure that Hauser's responses pertained solely to the construction of the 138KW permanent synchronous interconnection and did not concern the 69KV temporary intertie. *See* Transcript at pp. 14,189-14,192.

APPENDIX J

Judgment of the United States Court of Appeals For the Sixth Circuit

(Filed May 24, 1984)

No. 82-3053

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF CLEVELAND,
Plaintiff-Appellant,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendant-Appellee.

Before: MERRITT, MARTIN and WELLFORD, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX K

Section 105A, Atomic Energy Act, 42 U.S.C. § 2135(c) (1976)

§ 2135. Anti-trust provisions governing licenses; reports to Attorney General

* * * * *

(c) (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 2133 of this title: Provided however, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 2133 of this title unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

(3) With respect to any Commission permit for the construction of a utilization or production facility issued

pursuant to subsection (b) of section 2134 of this title prior to December 19, 1970, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or December 19, 1970, whichever is later.

(4) Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate for the advice called for in paragraph (1) of this subsection.

(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection (a) of this section.

(6) In the event the Commission's finding under Paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

(7) The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection (a) of this section.

(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 2133 of this title, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: *Provided*, That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect.

APPENDIX L

Federal Rules of Evidence, Rule 403

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

APPENDIX M

Federal Rules of Evidence, Rule 404(b)

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

* * * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Office - Supreme Court, U.S.
FILED
SEP 13 1984
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CLERK

No. 84-280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEVELAND,

Petitioner,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In a suit claiming a violation of Section 2 of the Sherman Act against a single defendant is it an abuse of discretion for the trial judge to refuse to give collateral estoppel effect to findings of a hearing panel of an administrative agency in a proceeding (a) under a different statute, (b) involving claims of conspiracy by five companies (including the Respondent), (c) which findings were in conflict with those of another administrative agency, and (d) where it was uncertain which findings were the basis of the decision by the appellate panel of the agency?

2. Was it an abuse of discretion for the trial court in a Sherman Act Section 2 case to refuse to admit evidence of activity, which under the "Noerr-Pennington" doctrine could not form the basis for antitrust liability, where he found that such evidence on the question of intent was of "diminished probative value" which did not "outweigh their likely prejudicial effect."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-280

CITY OF CLEVELAND,

Petitioner,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

COUNTER-STATEMENT OF THE CASE

Petitioner, the City of Cleveland, through its Utility Department (Muny Light), is in direct house-to-house competition with Respondent, the Cleveland Electric Illuminating Company (CEI),[1] in the sale of electric energy at retail in a portion (about 30 square miles containing about 20 percent of Cleveland electric customers) of the City of Cleveland, Ohio and its environs. The Respondent provides electric service at retail throughout a 1700 square mile area of northeastern Ohio, except in Painesville, a small city about 35 miles east of Cleveland. The City claimed that CEI monopolized or

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[1] In accordance with Rule 28.1 of the Rules of the this Court, Respondent states that it has no parent company, subsidiary (other than wholly owned subsidiary) or corporate affiliate.

attempted to monopolize the wholesale market and the retail market for electric power in a "substantial portion" of northeastern Ohio in violation of Section 2 of the Sherman Act by certain specific acts or refusals to act.[2]

The City alleged that as a consequence of CEI's acts, Muny Light lost customers, was forced out of the generation business, and was denied access to cheap power sources. The defense was: (1) that the condition of Muny Light and its losses were the proximate result of the City's mismanagement and neglect, rather than any act or omission by CEI; and (2) that in any event the acts complained of were normal competitive activity and no duty rested on CEI to rescue its competitor, Muny Light, from bankruptcy.

Underlying all of the claims in the case is the issue of whether CEI had a duty to aid its competitor. At the time the original complaint was filed, Muny Light was bankrupt. It would have been out of business had it been a private enterprise. It had operated at a loss every year since 1969 and survived only by reason of massive infusions of cash from the general funds of the City, which by the close of evidence in the case amounted to $34 million.

There is no reported antitrust case which embodies in any relevant degree the fact situation here involved. Out of some 2100 places where municipal electric systems ex-

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[2] The action originally was filed against CEI and four other electric utilities which had entered into certain mutually advantageous planning, construction and operating agreements, dealing in part with the construction, ownership, and operation of nuclear generating stations, which organization was called CAPCO. The original complaint alleged a conspiracy in violation of Sections 1 and 2 of the Sherman Act to restrain commerce in electric power in northeastern Ohio and western Pennsylvania. Shortly before the first trial, the City settled with the defendants other than CEI. The City thereafter filed a second amended complaint, which abandoned all claims under Section 1 and of conspiracy. It alleged only monopolization and attempted monopolization by CEI of the electric business in a portion of northeastern Ohio in violation of Section 2.

ist, there are only two where direct and active competition in the retail distribution of electric energy now exists: Bay City, Michigan and Cleveland, Ohio. As even the City's expert conceded, the retail distribution of electric energy is ordinarily regarded as a natural monopoly and, long-range, active competition is not economically sustainable. The City's basic complaint was that CEI failed to provide help to enable the City better to compete with CEI. In the competitive struggle, historically Muny Light had lower rates and CEI had better service. We argued in the courts below and, if certiorari is granted, our contention in this Court will be that, as a matter of law, in a natural monopoly situation Section 2 of the Sherman Act does not require CEI to contribute to the impairment of its own business by helping its tax-subsidized competitor to cure its operating deficiencies.

In any event, we submit that this is not a case for this Court to grant certiorari. Each of the issues raised in the Petition involves the exercise of discretion by the District Court, and the only question is whether the District Court abused that discretion. With respect to both questions presented, the District Court made considered decisions in lengthy memoranda, using principles in accord with the decisions of this Court. There is no question of law involved. There is no conflict among the circuits. There is no conflict with the decisions of this Court.

REASONS FOR DENYING THE WRIT

A. The Decisions Below Are Wholly Consistent With The Decisions Of This Court With Respect To Collateral Estoppel.

The proceeding before a Nuclear Regulatory Commission (NRC) Licensing Board, the findings of which Petitioner claims should have been given collateral estoppel effect, arose out of applications by five public utilities, including Respondent, for licenses to construct certain nuclear power plants. Based upon complaints by the City of Cleveland, the Assistant Attorney General of the Anti-

trust Division advised the NRC to hold an "antitrust hearing" on the application for nuclear licenses. Under the provisions of 42 U.S.C. § 2135(c)(5) (1976), this required the NRC to hold hearings and to determine whether activities under the proposed licenses would "create or maintain a situation inconsistent with the antitrust laws." A Licensing Board (the *nisi prius* hearing agency of the Commission) held extended hearings after which it found that the five companies, including Respondent, had engaged in practices inconsistent with the antitrust laws. The panel recommended approving the applications for nuclear licenses, but attaching certain conditions thereto. This decision was appealed to an Appeal Board whose decision became the final order of the Commission.

The Licensing Board made 222 separate findings of fact, many with several sub-parts. The Appeal Board affirmed, with modifications, the order of the Licensing Board but as to the facts said only that it concurred in the "ultimate factual and legal conclusions" of a draft opinion of a member of the Appeal Board who resigned prior to the Appeal Board's decision. In its brief in the Court of Appeals, the Petitioner specifically complained about a failure to apply collateral estoppel to only six of the 222 Licensing Board findings. The City asserts in its Petition that the Appeal Board "affirmed, with modifications, the Licensing Board's Initial Decision (antitrust), and in so doing resolved the overwhelming majority of the factual issues in the identical way the Licensing Board had." (Petition at 3). This is simply not so, and if we may say so, the Petitioner is something less than frank in elucidating the circumstances bearing upon the decisions of the courts below relative to collateral estoppel.

1. The NRC Appeal Board consisted of three persons. The member who was assigned to write the opinion resigned from the Appeal Board shortly after completing

his draft of an opinion. The two remaining members, who made the decision, stated as follows at the very outset of the Appeal Board decision:

> "Shortly after completing his opinion, however, our colleague resigned from the Appeal Panel to enter private law practice in another city. It was impossible for us to complete our own review of Mr. Sharfman's lengthy decision before his departure. And since that time, considerations of avoiding even the appearance of a conflict of interest situation have served to preclude our discussing with him any aspect of this proceeding.
>
> Had Mr. Sharfman remained a member of this Board, or continued to be available for consultation, we might well have suggested revisions in his treatment of certain issues and have endeavored in other respects to persuade him of the correctness of our views (particularly on the question of relief) to the extent that they do not coincide with his. Those options have not been open to us. In the circumstances, we file his opinion as it was presented to us (pp. 65*ff.*, *infra.*). We concur in its ultimate factual and legal conclusions and the result it reaches except where indicated in our separate opinion, which follows immediately." (ALAB-560 p. 3. Tab 3 of Volume I of Petitioner's filed Appendix.)

Given the treatment by the Appeal Board quoted above, it is impossible to know not only what facts were necessary to the decision of the Appeal Board, but more basically, what facts the Appeal Board actually found or approved, specifically or otherwise. All the Appeal Board said in this respect was that it concurred in the "ultimate factual and legal conclusions." Of course, the ultimate conclusion was that the issuance of the license would "create or maintain a situation inconsistent with the antitrust laws" unless specified conditions were placed thereon. But this ultimate finding is of no collateral estoppel use to the Petitioner.

The Petitioner makes no reference to the confusing proceedings before the Appeal Board nor the difficulties created thereby. This ignores one of the important reasons articulated by the District Court in its determination not to give collateral estoppel effect to the findings of the Licensing Board. (See Petition at A39.) There is simply no way to tell what specific factual findings were regarded by the Appeal Board as necessary to the outcome of the proceeding. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

2. The legal standard applicable to the NRC proceeding is substantially different from Section 2 of the Sherman Act. Under 42 U.S.C. § 2135(c)(5), the Commission is required to:

> ". . . make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ."

Not only do the substantive standards differ substantially from those applicable in a Sherman Act Section 2 case,[3] but there were certain important procedural differences. For example, the Licensing Board refused to give any effect to the *Noerr-Pennington* doctrine, an important matter here, because, it said, one is not entitled to a government license as a matter of right. The Board was not bound by any statute of limitations whereas the Clayton Act statute of four years applies here. Moreover, the proceeding before the NRC Licensing Board was a

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[3] The Licensing and Appeals Board of the NRC have recognized this difference in legal standard, and consequently held that they will *not* give collateral estoppel effect to a judgment of a United States District Court which found no violation of the antitrust laws. *In the Matter of Houston Lighting and Power Co., et al.*, 10 NRC 563 (1979), *aff'd by Appeal Board*, 11 NRC 14 (1980). See also, *Alabama Power Co. v. Nuclear Regulatory Commission*, 692 F.2d 1362, 1367-69 (11th Cir. 1982), *cert. denied*, 102 S. Ct. 72 (1983), and A63-66.

conspiracy case[4] involving alleged restraints on the electric business in northeastern Ohio and western Pennsylvania—a much broader inquiry—and the conspiracy claim had an important bearing on the admissibility of evidence of the conduct of alleged co-conspirators. These procedural differences alone are an adequate basis for the denial of collateral estoppel. *Parklane Hosiery Co. v. Shore, supra,* 439 U.S. at 331.[5]

3. Proceedings before a Federal Power Commission administrative law judge involving only the City and CEI resulted in a finding that the City's claim that its difficulties in maintaining service to its customers were due in whole or part to CEI's anti-competitive practices was not supported by the record. The ALJ found expressly that the City's inability to furnish reliable, dependable service was due primarily to incompetent management and inefficient operations—precisely the claim we made in the courts below. This finding was affirmed by the Federal Power Commission and not appealed by the City.[6]

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[4] There is no doubt that both the Licensing and the Appeal Board perceived the fundamental issue to be whether *joint* conduct inconsistent with the antitrust laws had occurred or would occur if a license were granted. *See In re Toledo Edison Co. and Cleveland Electric Illuminating Co.,* 10 N.R.C. 265, 277 (1979).

[5] In fact, three of the four factors that this Court in *Parklane Hosiery* directed a District Court to consider in determining whether, in its discretion, to apply collateral estoppel in a non-mutual setting also appropriately are considered where mutuality of the parties exists: whether a defendant had little incentive to litigate the first action, whether the judgment relied upon for estoppel might be inconsistent with one or more previous judgments in favor of defendant, and whether the second action affords defendants procedural opportunities unavailable in the first action. *See, e.g., Parklane Hosiery v. Shore, supra,* 439 U.S. at 330-331 n. 15; *The Evergreens v. Nunan,* 141 F.2d 927 (2d Cir. 1944); and *Tipler v. E.I. Du Pont de Nemours and Co.,* 443 F.2d 125, 128-29 (6th Cir. 1971).

[6] *City of Cleveland v. Cleveland Electric Illuminating Co.,* 49 F.P.C. 118 (1973), *reh'g denied,* 49 F.P.C. 631 (1973), *aff'd in all relevant respects,* 525 F.2d 845 (D.C. Cir. 1976).

The District Court was thus presented with conflicting findings of fact by two administrative agencies and in these circumstances held that collateral estoppel should be applied to neither. (See memorandum and order, February 15, 1978 (Petition, A47 at A52; 538 F. Supp. at 1232)).

4. The original complaint alleged a conspiracy among five defendants. As noted above, the complaint was amended (a) to eliminate all claims of conspiracy or of restraint of trade in a broad area of northeastern Ohio and western Pennsylvania and (b) to state a claim, against CEI alone, of monopolization or attempted monopolization in a limited area of the City of Cleveland and its environs.

The City filed with its Petition, as Volume 2 of its Appendix, a copy of the elaborate appendix which accompanied its motion in the trial court for an order giving collateral estoppel effect to the findings of the NRC Licensing Board. Petitioner, after inviting this Court's attention to this appendix, states that the City was compelled "to relitigate identical factual issues in the District Court which had been finally resolved previously by the NRC." (Petition at 4-5). If the City is suggesting that the issues referred to there are the ones it was "compelled to relitigate," this is simply not so. The statement in the Court of Appeals brief and the materials contained in Volume 2 of the record are the only times the Petitioner was specific about the findings for which it claimed collateral estoppel. In Volume 2 of the Appendix, the City claimed that 206 of the 222 findings of fact made by the NRC Licensing Board tracked specific paragraphs of its complaint. However, this motion was filed October 26, 1979, and the complaint referred to therein was the original complaint, alleging a conspiracy among five defendants to violate Sections 1 and 2 of the Sherman Act in a wide geographic area. However, thereafter the Petitioner amended its complaint, and, as noted

above, eliminated all conspiracy claims, all defendants except CEI and greatly restricted the area of alleged anti-competitive conduct. The Petitioner thereafter never modified its motion to take into account the "findings" that were no longer germane. We have made no attempt to go through the nearly 100 pages of Volume 2 to ascertain how many of the items which were claimed for collateral estoppel under the original complaint would be arguably applicable to the second amended complaint. However, the City complained of only six items in its brief in the Court of Appeals.

It is true that collateral estoppel may apply to final decisions of administrative agencies, *e.g., United States v. Utah Construction Co.*, 384 U.S. 394 (1966), but it is applied more selectively in the administrative context.[7] The District Court's rationale, approved by the Court of Appeals, is fully set out in its memorandum and order of February 15, 1978 (cited above).

The District Court properly exercised its discretion[8] and the Court of Appeals properly approved the trial

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[7] *Tipler v. E. I. DuPont de Nemours & Co., supra*, 443 F.2d at 128; *Artukovic v. Immigration & Naturalization Service*, 693 F.2d 894, 898 (9th Cir. 1982) ("in the administrative law context, the principles of collateral estoppel and res judicata are applied flexibly"); *United States v. Lasky*, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979) (collateral estoppel is "not to be applied to administrative decisions with the same rigidity as their judicial counterpart. . . . [T]he need to proceed cautiously in this area is acute, and due regard must be given in each case as to whether the application of the doctrine is appropriate in light of the particular prior administrative proceeding"); *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973); *Old Dutch Farms, Inc. v. Milk Driver Local 584*, 281 F. Supp. 971, 974 (E.D. N.Y. 1968).

[8] Contrary to Petitioner's suggestion (Petition at 12), the application of collateral estoppel, being an equitable doctrine, always contains an element of discretion. *See, e.g., Alexander Hospital, Inc. v. United States*, 5 Ct. Cl. 62, 69 (1984) ("collateral estoppel is an equitable doctrine; it should not be applied when it would be

court's conclusion. There is no conflict among the circuits. There is no failure to follow the decisions of this court. We do not understand Petitioner's suggestion that the Court of Appeals is at fault for its failure to refer to *United States v. Stauffer Chemical Co.*, 104 S. Ct. 575 (1984) and *United States v. Mendoza*, 104 S. Ct. 568 (1984). They involved only the applicability of collateral estoppel against the United States. They announced no innovation or change in the law of collateral estoppel in actions between private parties.

B. The Decision Below Affirming The Exclusion Of Certain Stipulations Is In Accordance With The Principles Enunciated By This Court.

The Petitioner (Petition at 22-23) engages in what we perceive to be a confusing and largely semantic discussion of whether the District Court "inverted" a "balancing test" in deciding whether to permit the use of the so-called Miller stipulations as evidence of intent. This is a non-issue. First, the District Court explicitly applied the evidentiary standard mandated by *United Mine Workers v. Pennington*, 381 U.S. 657, 670 n.3 (1965). In one of its several orders in this case respecting the exclusion of the Miller stipulations (Petition at A105), the District Court disposed of a renewed motion to admit those stipulations based upon the reasoning of a then recently decided case, *Lansdale v. Philadel-*

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unjust," *citing, inter alia, Parklane*); *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983) (collateral estoppel "is an equitable doctrine and its application, considered in light of fairness to both parties, rests within the broad discretion of the lower court"); *Tipler v. E. I. DuPont de Nemours & Co., supra*, 443 F.2d at 128 ("Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice"); *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 454 (D.D.C. 1978).

phia Electric Co., 517 F. Supp. 218, 223 (E.D. Pa. 1981). The District Court stated (Petition at A108):

> ". . . . the Pennsylvania District judge reiterated the test employed by this Court, and explicitly pronounced by the Supreme Court in *Pennington*, namely that it is within the discretion of the trial judge to admit the evidence upon the issue of intent 'if he deems it probative and not unduly prejudicial'. 381 U.S. at 670 n. 3;
>
> This court has consistently applied the above test in the instant matter and *Lansdale* is in no respect inconsistent with this principle." (Italics added).

Second, the District court explicitly considered both the probative value and the prejudicial effect of the Miller stipulations in his first order on the subject, September 19, 1980 (A85-A87) (see also, the Order of May 18, 1981, at A101).

The plain fact is that the District Court decided that although the Miller stipulations indeed had some probative value, though he found it to be limited, the admission of the stipulations would be "unduly prejudicial." This is exactly the task delegated to a trial court by this Court in *United Mine Workers v. Pennington*, *supra*, 381 U.S. at 670 n. 3. We do not believe that the question whether the District Court abused its discretion in this regard is a proper question on which to issue a writ of certiorari here.

Petitioner claims (Petition at 19) that the District Court in fact departed from the test laid down by this Court in *Pennington* by giving undue weight to First Amendment concerns. In purported support, it quotes from three different orders of the District Court: July 30, 1981 (A104); August 3, 1981 (A105); and August 17, 1981 (A119). Those quotations are taken out of context.

The July 30, 1981 Order concerned a claim by Petitioner that because the Miller stipulations had been admitted into evidence in the first trial and thus had become "a matter of public record", the First Amendment considerations upon which the *Noerr-Pennington* doctrine is based no longer existed and any *Noerr-Pennington* considerations were an irrelevancy. To this rather surprising contention, the District Court responded that the City failed to comprehend that under *Noerr-Pennington* undue prejudice to an antitrust defendant results not from the mere public disclosure, but rather from the fact that protected activity is likely to be used by the jury as a "legally inappropriate basis for liability. . . ." (A104). This is, of course, a perfectly correct statement of hornbook law.[9] But contrary to Petitioner's suggestion, the District Court did not simply rely upon the inherent danger of prejudice in admitting the Miller stipulations. As pointed out above, the District Court explicitly considered the probative value of the proffered evidence, and found it to be outweighed by the potential prejudicial effect. (A85-A87). The August 3, 1981 quotation (A105) was simply a statement by the District Court of an overall purpose of the *Noerr-Pennington* doctrine, *i.e.*, to protect against any chilling effect upon the exercise of First Amendment rights. The August 17, 1981 Order dealt with the question of whether counsel for Petitioner could "trigger" the admission of the Miller stipulations simply by undertaking a course of cross-examination of Respondent's witnesses designed solely to require the witness either to mention the *Noerr-Pennington* protected conduct or commit perjury.[10] The District Court held that permitting

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[9] For example, the Advisory Committee Note to Federal Rule of Evidence 403 states that "unfair prejudice" within the meaning of the Rule means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

[10] In the first trial of this case, which resulted in a hung jury, the District Court admitted the Miller stipulations on his own motion

such a course of cross-examination would "emasculate and indeed gut the constitutional protection afforded under the *Noerr-Pennington* doctrine and have a 'chilling effect' on the exercise of First Amendment rights." (A119). To have ruled otherwise would have been in effect to permit a litigant to force the admission of evidence of protected activity at will, regardless of its potential prejudicial effect.[11]

C. There Is No Issue Here Relative To A "Sham" Proceeding.

The suggestion by Petitioner that this case presents a real issue as to whether one lawsuit can be a "sham proceeding" is a red herring. It has never been clear to us why the City raised this claim at all. In the District

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because a CEI witness had volunteered, on direct examination, testimony inconsistent with them. Curiously, counsel for neither the Petitioner nor Respondent realized that the "triggering" of the Miller stipulations had occurred until the District Court announced it.

[11] By the same token, Petitioner's suggestion of "an apparent conflict of the Circuits on this issue" (Petition at 21) is without substance. Petitioner simply juxtaposes cases in which courts have found that the prejudicial effect of admitting particular evidence of First Amendment-protected activity outweighed the probative value of such evidence against cases in which courts—in totally different factual contexts—admitted evidence of First Amendment-protected activity. This simply demonstrates that in applying the same legal standard in different circumstances, different courts appropriately reach different results as to the admissibility of different evidence of First Amendment-protected activity. The cases reflect no conflict as to the appropriate legal test to be employed in this regard. Indeed, one of the cases which Petitioner lists on the "wrong" side of the "conflict," *Feminist Womens' Health Center v. Mohammed*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), is cited approvingly in cases which Petitioner would place on the other side of the "conflict," *i.e.*, *Alexander v. Nat'l Farmers' Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982); *MCI Communications v. American Tel. and Tel.*, 708 F.2d 1081, 1160 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 234 (1983).

Court's Order of August 3, 1981 (A107), it is correctly said:

> "In the instant action, however, the City advances no contention that the defendant's described conduct as stipulated in Stipulations Nos. 227 through 241 and the profferred bond issue testimony is actionable under the Sherman Antitrust Act. Indeed, the City in its supporting brief filed with its present motion candidly concedes that it 'does not ground Sherman Act liability upon CEI's conduct with respect to the Miller suit or the $9.8 million bond issue.' This acknowledgment is entirely consistent with Plaintiff's previous representations. Thus, in the City's brief of September 18, 1980, plaintiff clearly stated that it 'has not alleged this CEI-sponsored taxpayer suit as a violation of the Sherman Act and does not seek to predicate damages upon the suit.' *Id.* at 3. Similarly, in the plaintiff's brief of September 18, 1980, plaintiff acknowledged that it 'is not basing a claim for relief upon the efforts undertaken by CEI to prevent the City from obtaining a vitally needed capital for MELP.' *Id.* at 1."

Petitioner made an argument in the Court of Appeals that the Miller lawsuit was "sham litigation," but only claimed that the trial court's refusal to find it was sham litigation "deprived the jury of evidence of CEI's intent." But, of course, if it were sham litigation it would have been admissible as substantive evidence of an antitrust violation under this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). It was never offered for this purpose. The "sham" claim has no relevance to the question of whether the Court abused its discretion in finding that the admission of the stipulations as evidence of intent would be unduly prejudicial.

In any event, it seems clear that it was not sham litigation. The relief sought in the action was granted in substantial part. *See* Stipulation 239, Petition at A71.

Moreover, there were no procedural infirmaties under state law. This is a non-issue.

CONCLUSION

The consideration given by the District Court to the issues raised in the Petition, as well as the many other issues which arose before and during the two lengthy trials, was unusually careful. Most of the orders issued by the Court are reported at 538 F. Supp. 1227 to 1354. Due in part to this careful and thoughtful consideration, the trial of this complicated and long drawn out proceeding was singularly free of error.[12] At bottom, all that is involved here is the exercise of discretion, by an experienced trial judge, relative to the admissibility of evidence. There is no issue warranting the issuance of a writ of certiorari.

Respectfully submitted,

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[12] Various aspects of this case have been vainly appealed by the City to the Sixth Circuit three times before and this Court has twice before denied certiorari. (*See* Petition at A2, n.1).

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No. 84-280

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEVELAND,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

IN RE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER THE CITY OF CLEVELAND

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PETITIONER'S RESPONSE TO NEW MATERIAL RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

A. CEI ERRS IN STATING THAT THIS CASE INVOLVES NO QUESTION OF LAW NOR ANY CONFLICT WITH THE DECISIONS OF THIS COURT

Respondent, the Cleveland Electric Illuminating Company ("CEI") is wrong when it states that abuse of discretion is the only issue in this case and that: "There is no question of law involved. There is no conflict among the circuits. There is no conflict with the decisions of this Court." CEI's Brief in Opposition ("CEI Brief") at 3.

CEI compounds its error when it states: "We do not understand Petitioner's suggestion that the Court of Appeals is at fault for its failure to refer to *United States v. Stauffer Chemical Co.*, 104 S. Ct. 575 (1984) ['*Stauffer*'] and *United States v. Mendoza*, 104 S. Ct. 568 (1984) ['*Mendoza*']." CEI Brief at 10. What CEI may have overlooked is that these two decisions synthesized the entire body of collateral estoppel law and clarified the following propositions which are dispositive of the collateral estoppel issue in this case: (1) The basic distinction to be drawn in the application of the collateral estoppel doctrine is between *mutual* and *nonmutual* estoppel situations. *See*, Petition at 9, n.8; (2) In *nonmutual* situations, such as in *Mendoza*, public policy considerations require that collateral estoppel not be applied against the United States; (3) In *mutual* situations, such as in *Stauffer* and such as in the instant case (issue preclusion with respect to facts previously adjudged in litigation involving the same parties) those same public policy considerations do not prevent collateral estoppel from being applied against the United

States (and, *a fortiori*, against private litigants); and (4) In both *Stauffer* and *Mendoza*, this Court reaffirmed its holding in *Montana v. United States*, 440 U.S. 147 (1979) ("*Montana*"), that in mutual estoppel situations,

> [O]nce a court has decided an issue of fact . . . necessary to its judgment, *that decision is conclusive* in a subsequent suit based on a different cause of action involving a party to the prior litigation.

Mendoza, 104 S. Ct. at 571, citing *Montana*, 440 U.S. at 153 (emphasis added). *See also* Petition at 7-11.

In *Mendoza*, Mr. Justice Rehnquist was writing for a unanimous Court. In *Stauffer*, he was writing for eight members of this Court while Mr. Justice White filed a concurring opinion agreeing with the other Justices in the result but stating that in his view, collateral estoppel should not be applied further than that.

Since the collateral estoppel issue in this case is embraced within the reasoning of *Stauffer* and *Mendoza*, when the panel majority below made its ruling, it disregarded two unanimous decisions of this Court decided four months earlier which, if considered, would have required the opposite result. Thus, this case presents both an important question of law and a refusal by the Court of Appeals to follow existing Supreme Court precedent. These questions go far beyond a mere abuse of discretion, which CEI erroneously claims is the only issue in this case. CEI Brief at 3.[1]

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1. CEI also attempts to divert attention from the issues presented by this Petition when it argues that: "Underlying all of the claims in the case is the issue of whether CEI had a duty to aid its competitor." CEI Brief at 2. This argument is without merit in view of this Court's holding in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), that an electric utility company with market power, like every other business, is forbidden

(Continued on following page)

B. CEI ERRS IN STATING THAT IT IS IMPOSSIBLE TO KNOW WHAT THE NRC APPEAL BOARD ACTUALLY FOUND OR APPROVED

CEI disputes the City's statement that in the prior litigation between the City and CEI, the NRC's Atomic Safety & Licensing Appeal Board ("Appeal Board") resolved the overwhelming majority of the factual issues in the identical way the NRC's Atomic Safety and Licensing Board ("Licensing Board") had. CEI Brief at 4. CEI also states that "it is impossible to know . . . what facts the Appeal Board actually found or approved, specifically or otherwise." CEI Brief at 5. At the same time, CEI admitted that it had made no attempt to go through the Appendix to the City's collateral estoppel motion referencing the Licensing Board's and the Appeal Board's findings "to ascertain how many of the items which were claimed [by

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Footnote continued—

from maintaining or enhancing its market dominance by refusals to deal. Additionally, in opposing that portion of the Petition dealing with the trial court's exclusion of the Miller Stipulations, when CEI states that there is no conflict among the circuits, CEI Brief at 3, it ignores the conflicting lower court decisions on two questions: (1) the status to be accorded to First Amendment petitioning activity in the implementation of the *Pennington* evidentiary exception (*see* Petition at 20-22); and (2) whether a single lawsuit can constitute a "sham" proceeding (*see* Petition at 28-29). All of the remaining statements concerning the Miller Stipulations made by CEI in its Brief in Opposition are answered in the Petition, with one exception: It is wrong for CEI to try to create the impression at pages 10 and 11 of its Brief that the trial court's exclusion of the Miller Stipulations in this case was in harmony with Judge Huyett's ruling in *Lansdale v. Philadelphia Electric Co.*, 517 F. Supp. 218 (E.D. Pa. 1981) ("*Lansdale*"). As a matter of fact, in *Lansdale*, the plaintiff offered evidence of the defendant's activities before the Federal Energy Regulatory Commission ("FERC") as bearing on the issue of the defendant's intent. After quoting the *Pennington* evidentiary exception, Judge Huyett held: "Based upon the discussion of *Noerr-Pennington* above and the quoted language in footnote 3, I conclude that *Noerr-Pennington* would not bar the admission of FERC activities if relevant [on the issue of intent] under count I." 517 F. Supp. at 223.

the City] for collateral estoppel under the original complaint would be arguably applicable to the second amended complaint." CEI Brief at 9.

Any careful review of the Findings of Fact of the Licensing Board and the Appeal Board would demonstrate that *all* members of the Appeal Board agreed on the validity of the Licensing Board's Findings of Fact insofar as the City is seeking collateral estoppel effect.

The Appeal Board consisted of three members, one of whom, Mr. Sharfman, was assigned to write the Appeal Board's opinion. He completed the opinion but resigned from the NRC before it was issued. The other two members of the Appeal Board, Messrs. Rosenthal and Salzman, issued the decision of the Appeal Board which consisted of both Mr. Sharfman's opinion and their opinion. This decision appears in Volume 1 of the materials lodged with the Clerk of this Court (*see* Petition at 4, n.2.)

Where Messrs. Rosenthal and Salzman disagreed with Mr. Sharfman, they specifically so stated in their opinion: "We concur in its [Mr. Sharfman's opinion's] ultimate factual and legal conclusions and the result it reaches except where indicated in our separate opinion . . . ." 10 NRC 265, 270, ALAB-560 at 3. Mr. Sharfman's opinion, in turn, expressly affirmed the Findings of Fact made by the Licensing Board "except insofar as they are inconsistent with anything in this opinion . . . ." 10 NRC 265, 300, ALAB-560 at 67. Mr. Sharfman's opinion also stated:

> Certain parts of the opinion below are not discussed in this opinion at all. That is not an oversight; it simply means that we see no need to supplement or comment upon what the Licensing Board has said on the subject.

10 NRC 265, 300, ALAB-560 at 67, n.4. *See also* Circuit Judge Martin's dissenting opinion below, Slip Opinion at 26-27, App. A at A27-A28.

Two examples will suffice to show the specificity with which the Appeal Board addressed the Findings of Fact made by the Licensing Board: (1) At 10 NRC 265, 355, ALAB-560 at 187, n.242, the Appeal Board cites specifically the Licensing Board's Findings of Fact 33-63 and 201-210 dealing with CEI's single firm conduct; and (2) At 10 NRC 265, 398, ALAB-560 at 294, n.452, the Appeal Board cites specifically the Licensing Board's Findings of Fact 41-46 and 72 dealing with CEI's single firm conduct and Findings of Fact 102, 148-51 and 179-80 dealing with the single firm conduct of the other Applicants. Many other examples could be cited.

The Appendix which the City attached to its October 26, 1979 motion for collateral estoppel in the trial court (*see* Petition at 4, n.3) sets forth all of the citations where the Appeal Board resolved factual issues in the identical way the Licensing Board had. Petitioner invites the Court's attention to this Appendix which is Volume 2 of the materials lodged with the Clerk of this Court.

As can be seen from the above, the Appeal Board made it abundantly clear which factual issues it had resolved in the identical way the Licensing Board had, CEI's assertions to the contrary notwithstanding.

C. CEI ERRS IN STATING THAT THE NRC'S SUBSTANTIVE STANDARDS REPRESENT AN ADEQUATE BASIS FOR THE DENIAL OF COLLATERAL ESTOPPEL IN THIS CASE

CEI is in error when it states that it was proper for the courts below to deny collateral estoppel in this case because "[t]he legal standard applicable to the NRC proceeding is substantially different from Section 2 of the Sherman Act." CEI Brief at 6.

First, the City is not seeking collateral estoppel effect for the NRC's conclusions of law. Second, in analyzing the conduct of CEI and the other Applicants, the NRC relied on principles of the antitrust laws as interpreted by this Court and the lower courts of the United States. *See* the Licensing Board's discussion of legal standards at 5 NRC 133, 145-51. *See also* the Appeal Board's recognition of its responsibility to apply antitrust principles as developed by the federal courts. 10 NRC 265, 272, ALAB-560 at 7. Further, according collateral estoppel effect to the NRC's final *factual* adjudications under *Montana, Stauffer* and *Mendoza,* is not inappropriate just because the federal courts have exclusive jurisdiction over the City's Sherman Act claims. *Becher v. Contoure Laboratories, Inc.,* 279 U.S. 388, 391 (1929).

For support of its argument that the NRC's substantive standards justify the denial of collateral estoppel in this case, CEI cites *In the Matter of Houston Lighting and Power Co., et al.,* 10 NRC 563 (1979), *aff'd by Appeal Board,* 11 NRC 14 (1980), and *Tipler v. E.I. duPont de Nemours and Co.,* 443 F.2d 125 (6th Cir. 1971). The City submits that these cases, as well as CEI's contentions about the NRC's substantative standards, are inapposite for the reasons set forth by Circuit Judge Martin in his dissenting opinion below, Slip Opinion at 27-28, App. A at A28-A30.

D. CEI ERRS IN STATING THAT THE NRC'S PROCEDURES REPRESENT AN ADEQUATE BASIS FOR THE DENIAL OF COLLATERAL ESTOPPEL IN THIS CASE

CEI cites three procedural matters affecting the NRC antitrust review which CEI claims were different from a Section 2 monopolization case tried in a District Court. CEI asserts that "These procedural differences alone are an adequate basis for the denial of collateral estoppel." CEI Brief at 7, but CEI's claims are without foundation.

Conspiracy Case v. Single Firm Conduct: CEI states: "the proceeding before the NRC Licensing Board was a conspiracy case . . . and the conspiracy claim had an important bearing on the admissibility of evidence of the conduct of alleged co-conspirators." CEI Brief at 6-7. CEI is in error in suggesting that the NRC antitrust review "was a conspiracy case" and nothing more. Since the nuclear units to be licensed were owned by all the Applicants, the NRC necessarily reviewed both the individual conduct and the joint conduct of CEI and the other Applicants. That the Licensing Board carefully scrutinized single firm conduct, however, can be seen from that portion of the Licensing Board's opinion which commences at 5 NRC 165 entitled "INDIVIDUAL APPLICANT ACTIVITIES." For example, Findings of Fact 26-74 deal exclusively with CEI's single firm conduct. 5 NRC at 165-79. The Licensing Board used its Findings of Fact concerning the individual conduct of CEI and the others to conclude that "within the relevant product and geographic markets, Applicants *have acted individually* and collectively to eliminate one or more other electric entities and to preclude competition." 5 NRC at 255 (emphasis added). In affirming, the Appeal Board found specifically that CEI's refusal to wheel and refusal to interconnect constituted monopoli-

zation. 10 NRC 265, 327-31 and 362-69, ALAB-560 at 125-32 and 208-221. It is clear from the above that the NRC made Findings of Fact concerning CEI's conduct as a single firm and these findings were highly relevant to the City's monopolization case against CEI. The fact that there were also conspiracy claims before the NRC does not provide any justification for the rejection of the doctrine of collateral estoppel in this case.

Noerr-Pennington: CEI states: "[T]he Licensing Board refused to give any effect to the *Noerr-Pennington* doctrine, an important matter here, because, it said, one is not entitled to a government license as a matter of right." CEI Brief at 6. CEI does not point out that the Appeal Board specifically applied the *Noerr-Pennington* doctrine, rejecting the Licensing Board's implication that protected petitioning activity "either constitutes a violation of the antitrust laws or taints their [the Applicants'] other conduct with antitrust illegality." 10 NRC 265, 307, ALAB-560 at 81.

Statute of Limitations: CEI states: "The [Licensing] Board was not bound by any statute of limitations whereas the Clayton Act statute of four years applies here." CEI Brief at 6. This argument provides no basis for the rejection of collateral estoppel in this case. It is hornbook law that events which took place prior to the limitations period may be admitted in an antitrust case to show the purpose and character of other acts, and such evidence was admitted by the trial court in this case. *See also* cases cited in the Petition at 18, n.22.

The City submits that none of the "procedural differences" to which CEI has drawn attention furnishes any justification for the denial of collateral estoppel in this case.

E. CEI ERRS IN ASSERTING THAT COLLATERAL ESTOPPEL CANNOT APPLY TO THE NRC'S FINDINGS OF FACT UNLESS IT ALSO APPLIES TO AN FPC FINDING

CEI contends that collateral estoppel could not be granted to the NRC's Findings of Fact because they were contradicted by a finding of an administrative law judge at the Federal Power Commission ("FPC"). CEI Brief at 7-8. There are several reasons why CEI's contention is without merit.

In the first place, no discovery was conducted in the FPC concerning the City's allegations of anticompetitive conduct on the part of CEI. As a consequence, the full dimensions of CEI's plan of monopolization and attempt to monopolize during the years preceding the March, 1972, FPC hearing were unavailable to the City for presentation to the FPC administrative law judge. Second, the hearing held in March, 1972, could not and did not consider CEI's anticompetitive conduct during the period 1972-1975.[2] Finally, the observations of the administrative law judge concerning CEI's unfair practices were not necessary to his decision that the City should be granted an interconnection with CEI. Even the trial court in this case recognized that collateral estoppel could not be given to this finding by the FPC administrative law judge because the requirement of necessity was not satisfied. The trial court held that "a determination that defendant CEI had in fact engaged in anticompetitive practices was not an immutable prerequisite to the granting [by the FPC] of the requested relief." Order February 15, 1978, 538 F. Supp. 1227, at 1234, App. C at A52. *See also* Circuit Judge Martin's dissenting opinion below, Slip Opinion at 25-26, App. A at A26-A27.

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2. This action was instituted by the City on July 1, 1975.

There is absolutely no authority for CEI's proposition that where a court is presented with conflicting findings of fact by two administrative agencies, collateral estoppel should be applied to neither. CEI Brief at 8. Rather, this Court's holdings in *Montana, Stauffer,* and *Mendoza,* and the other authorities cited in the Petition, set the criteria for giving collateral estoppel effect in subsequent litigation between the same parties to prior adjudications of disputed factual issues. The fact that under these criteria, collateral estoppel should not be applied to the FPC's finding described above is totally and completely irrelevant to the issues in this case.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the City's Petition, Petitioner respectfully urges this Court to grant the City's petition for a writ of certiorari in this case.

Respectfully submitted,

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